Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ~~78~~ - 952

RANDAL RUSH,
Defendant-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Garnishee-Appellant,

vs.

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT:

(a) Opinions Below 1

(b) Grounds on Which Jurisdiction Is Invoked .. 2

(i) The Nature of the Proceeding 2

(ii) The Original Judgment Sought to Be Reviewed 3

(iii) Statutory Provisions Conferring Jurisdiction 3

(iv) Cases Sustaining Jurisdiction 3

(v) Statute Involved 4

(c) Question Presented 4

(d) Statement of the Case 5

(e) Substantiality of Federal Question 9

Conclusion 12

APPENDICIES:

Appendix A. Order of Minnesota District Court ...A-1

Appendix B. Opinion of Minnesota Supreme Court of September 10, 1976 .....A-8

Appendix C. Order of United States Supreme Court of June 27, 1977 .....A-27

Appendix D. Opinion of Minnesota Supreme Court of October 20, 1978 .....A-29

Appendix E. Judgment of Minnesota Supreme Court A-47

Appendix F. Notice of Appeal A-48

TABLE OF AUTHORITIES

Constitutional Provisions:

Fourteenth Amendment to United States Constitution 3

Statutes:

United States Code:
28 U.S.C. §1257(2) 3
28 U.S.C. §2103 3
Minnesota Statutes:
Minn. Stat. §571.41(2) 2, 4, 5

Cases:

DeRentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969) 11
Donawitz v. Danek, 366 N.E. 2d 253 (N.Y. 1977) ... 6
Forbes v. Boynton, 113 N.H. 617, 313 A. 2d 129 (1973) 10
Government Employees Insurance Co. v. Lasky, 454 S.W. 2d 942 (Mo. 1970) 11
Hanson v. Denckla, 357 U.S. 235 (1958) 3, 9
Harris v. Balk, 198 U.S. 215 (1905) 6, 7
Henry v. City of Rock Hill, 376 U.S. 776 (1964) ..3, 12
Home Insurance Co. v. Dick, 281 U.S. 397 (1930) .3, 9
Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967) 11
Howard v. Allen, 254 S. C. 455, 176 S.E. 2d 128 (1970) 11
International Shoe Co. v. State of Washington, 326 U.S. 310 (1945) 5, 7, 9
Javorek v. Superior Court, 131 Cal. Rptr. 768, 552 P. 2d 728 (1976) 11
Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 2d 187 (Okl. 1972) 11
Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972) 11
Lee-Hy Paving Corp. v. O'Connor, U.S. Sup. Ct. No. 78-140 6
Minichiello v. Rosenberg, 410 F. 2d 106, 117 (2nd Cir. 1968) 6
O'Connor v. Lee-Hy Paving Corp., 579 F. 2d 194 (2nd Cir. 1978) 6
Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970) 11
Robinson v. Shearer & Sons, Inc., 429 F. 2d 83 (3rd Cir. Pa. 1970) 11
Rush v. Savchuk, 433 U.S. 902 (1977) 2, 3, 4
Savchuk v. Rush, 245 N.W. 2d 624 (Minn. 1976) .. 1
Schwartz v. Consolidated Freightways Corp., 300 Minn. 487, 221 N.W. 2d 665 (1974) 10
Seider v. Roth, 17 N.Y. 2d 111, 216 N.E. 2d 312 (1966) 6, 9, 10, 11
Shaffer v. Heitner, 433 U.S. 186 (1977) ..3, 4, 5, 7, 9
Simpson v. Loehmann, 21 N.Y. 2d 305, 234 N.E. 2d 699 (1967) 6
Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975) .. 11
United States v. E. I. DuPont de Nemours & Co., 366 U.S. 316, 325 (1960) 3
Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) 3, 9
Werner v. Werner, 84 Wash. 2d 360, 526 P. 2d 370 (1974) 11

Secondary Authorities:

McLaughlin, New York Trial Practice, 179 N.Y.L.J. 1 (July 14, 1978) 10
Siegel, Supplementary Practice Commentary, McKinney's (New York) C.P.L.R., §5201, pocket part, pp. 15-78 (1974) 10-11
Zammit, Quasi in Rem Jurisdiction: Outmoded and Unconstitutional, 49 St. John L. Rev. 668 (1975) .. 11
Comment, 16 Buffalo L. Rev. 769 (1968) 11
Comment, 67 Columbia L. Rev. 550 (1967) 11
Note, Attachment of Liability Insurance Policies, 53 Cornell L. Rev. 1108 (1968) 11
Comment, 17 Dickinson L. Rev. 653 11

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No. ———

RANDAL RUSH,
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vs.

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

(a) OPINIONS BELOW

The order of the Minnesota District Court was not reported. It appears as Appendix A hereto (pp. A. 1-7, *infra*).

The initial opinion of the Minnesota Supreme Court affirming the District Court's order is reported: *Savchuk v. Rush*, 245 N.W. 2d 624 (Minn. 1976). It appears as Appendix B hereto (pp. A. 8-27, *infra*).

The order of this Court vacating the judgment of the Minnesota Supreme Court is reported: *Rush v. Savchuk,* 433 U.S. 902 (1977). It appears as Appendix C. hereto (pp. A. 27-28, *infra).*

The opinion of the Minnesota Supreme Court reaffirming the District Court's order is not yet reported. It appears as Appendix D hereto (pp. A. 29-46, *infra).*

(b) GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) *Nature of the proceeding.* This is a civil action by appellee (hereinafter Savchuk) against appellant (hereinafter Rush) for damages arising out of a 1972 Indiana automobile accident. At that time both Savchuk and Rush were citizens and residents of Indiana. At that time Rush and State Farm Mutual Automobile Insurance Company (hereinafter State Farm) were parties to a contract of automobile liability insurance issued in Indiana.

In 1973, after emigrating from Indiana to Minnesota, Savchuk commenced this action against Rush in the Minnesota District Court, claiming *quasi in rem* jurisdiction over Rush pursuant to Minn. Stat. §571.41(2). This statute, as construed by the Minnesota Supreme Court, permits a Minnesota resident to obtain *quasi in rem* jurisdiction over a non-resident by garnishing the non-resident's insurer provided that the insurer does business in Minnesota.

Rush and garnishee State Farm moved the District Court for a dismissal asserting lack of jurisdiction and denial of federal due process in the exercise of such jurisdiction. The motion was denied and an appeal was taken to the Minnesota Supreme Court. Following an affirmance, Rush and State Farm appealed to this Court which vacated the

Minnesota Supreme Court's judgment and remanded the matter to that Court. Following remand, the Minnesota Supreme Court again held that Minnesota's exercise of *quasi in rem* jurisdiction did not violate the due process clause of the XIVth Amendment to the United States Constitution.

(ii) *Original Judgment Sought to Be Reviewed.* The decision of the Minnesota Supreme Court was filed on October 20, 1978, and the judgment sought to be reviewed was entered on November 3, 1978. The judgment appears as Appendix E hereto (p. A. 47, *infra).* The notice of appeal was filed on November 17, 1978, and appears as Appendix F hereto (pp. A. 48-49, *infra).*

(iii) *Statutory Provision Conferring Jurisdiction.* The statutory provisions which confer jurisdiction of this appeal are 28 U.S.C. §1257(2) and, alternatively, 28 U.S.C. §2103.

(iv) *Cases Sustaining Jurisdiction.* Cases believed to sustain jurisdiction: *Shaffer v. Heitner,* 433 U.S. 186 (1977); *Hanson v. Denckla,* 357 U.S. 235 (1958); *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66 (1954); *Home Insurance Co. v. Dick,* 281 U.S. 397 (1930).

Furthermore, pursuant to this Court's order in *Rush v. Savchuk,* 433 U.S. 902 (1977), it is believed that appellants are entitled to invoke this Court's plenary jurisdiction to enforce its mandates. *United States v. E. I. DuPont de Nemours & Co.,* 366 U.S. 316, 325 (1960); see also, *Henry v. City of Rock Hill,* 376 U.S. 776 (1964).

(v) *Statute involved.* 4 Minnesota Statutes, §571.41, subd. 2 (1971), provides:

> "Garnishment shall be permitted before judgment in the following instances only:
>
> (1) For the purpose of establishing quasi in rem jurisdiction
>
> (a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or
>
> (b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or
>
> (c) the defendant is a non-resident individual, or a foreign corporation, partnership or association.
>
> (2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

(c) QUESTION PRESENTED

The Minnesota Court's construction of Minn. Stat. §571.41(2), in direct contravention of *Shaffer v. Heitner,* 433 U.S. 186 (1977), and of this Court's order, *Rush v. Savchuk,* 433 U.S. 902 (1977), grants to Minnesota courts *quasi in rem* jurisdiction over non-resident defendants who have absolutely no "minimum contacts" whatsoever with Minnesota in situations where the garnished "property" is not the subject of the litigation.

Thus, the question is: Does Minnesota's garnishment procedure pursuant to Minn. Stat. §571.41(2), as interpreted by the Minnesota Supreme Court, offend the traditional XIVth Amendment standards of fairness and substantial justice enunciated in *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945), which standards are expressly made applicable to *quasi in rem* proceedings by *Shaffer v. Heitner,* 433 U.S. 186 (1977)?

(d) STATEMENT OF THE CASE

In January 1972, Savchuk was a passenger in an automobile driven by Rush in Elkhart, Indiana. Both were Indianans. As a result of an accident, Savchuk allegedly sustained personal injuries. Rush was insured by State Farm which does business in Indiana and most of the other 47 contiguous states. Pursuant to the insurance policy, which is an Indiana contract, State Farm was obligated to defend Rush in the event of a suit claiming negligent operation of the automobile, and to pay any judgment rendered against him.

No suit was commenced in Indiana. Indiana has a guest statute which would effectively bar any suit by Savchuk.

In 1973, Savchuk emigrated to Minnesota (which does not have a guest statute and where foreign guest statutes are not enforced) and attempted to sue Rush by having Rush personally served in Indiana and by garnishing the State Farm policy—State Farm being subject to service of garnishment process in Minnesota because it also does business there.

Rush and State Farm immediately raised the federal constitutional question claiming lack of due process. Following the denial of their motion to dismiss, they appealed to

the Minnesota Supreme Court again raising the constitutional questions. The Minnesota Court properly undertook to decide the constitutional questions and improperly determined that there was no denial of due process to Rush. The Court reasoned that there was due process because (1) Rush had actual notice of the suit; (2) Rush's liability was limited to the amount of the insurance policy; and (3) because the *quasi in rem* procedure could only be used by claimants who were residents of Minnesota (App. B, p. A. 14).[1]

The Minnesota Court's exercise of such *quasi in rem* jurisdiction was first approved in *Seider v. Roth*, 17 N.Y. 2d 111, 216 N.E. 2d 312 (1966). The *Seider* rule has survived previous constitutional attack. E.g., *Simpson v. Loehmann*, 21 N.Y. 2d 305, 234 N.E. 2d 669 (1967), 21 N.Y. 2d 990, 238 N.E. 2d 319 (1968); *Minichiello v. Rosenberg*, 410 F. 2d 106, 117 (2nd Cir. 1968), *cert. denied*, 396 U.S. 844, 949 (1969); *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2nd Cir. 1978), *cert. denied sub nom. Lee-Hy Paving Corp. v. O'Connor*, U.S. Sup. Ct. No. 78-410 (Dec. 4, 1978), Powell and Blackmun, J.J., dissenting. Both the *Simpson* and the *Minichiello* courts determined that the *Seider* rule did not deny due process because of *Harris v. Balk*, 198 U.S. 215 (1905). Simply stated, *Harris v. Balk* stood for the proposition that the fictional presence of an intangible property right of a defendant in the forum state provided an *in rem* jurisdictional basis for the courts of that state, after a fictional seizure of that property by plaintiff, to determine any suit by plaintiff against defendant and to grant relief against defendant not exceeding the value of the property seized even though the seized property was not the subject matter of the suit.

[1]Minnesota's refusal to afford its *quasi in rem* procedures to non-residents would appear to create a serious equal protection problem. See *Donawitz v. Danek*, 366 N. E. 2d 253 (N. Y. 1977).

Then came *Shaffer v. Heitner*, 433 U.S. 186 (1977), in which this Court held that the minimum contacts standards of *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), are applicable to *in rem* actions as well as *in personam* actions, thus effectively overruling *Harris v. Balk*, *supra*.

Following this Court's decision in *Shaffer v. Heitner*, *supra*, its vacation of the Minnesota Supreme Court's judgment, and its remand of this case to that Court, a majority of the Minnesota Court adhered to their earlier pronouncement. In essence, the Minnesota Court reasoned:

1. That *Shaffer v. Heitner*, *supra*, is "not clear" (App. D, p. A. 34);

2. That "Minnesota's legitimate interest in facilitating recoveries for resident plaintiffs not only requires provision of a local forum, but may override [sic] traditional choice of law analysis" (App. D, pp. A. 36-37); and, therefore,

3. "It cannot be said that Minnesota lacks such minimally-requisite 'contacts, ties or relations' to those defending parties as to offend the requirements of due process" (App. D, p. A. 39).

The dissenting opinion of Mr. Justice Otis (in which two other Justices concurred), quite correctly points out that—

> "The inference to be drawn from this remand [by the United States Supreme Court] is not, in my opinion, that we are free to distinguish Shaffer and reinstate the judgment vacated by the Supreme

Court. As I construe it, we are simply afforded an opportunity to revise our decision to conform to Shaffer on the assumption we would have reached a different conclusion had Shaffer been decided when we wrote Savchuk. Any other inference would lead to the unlikely conclusion that the Supreme Court was merely delegating to us its responsibility to resolve a difficult constitutional question.

"Three specific rules recognized in Shaffer dispose of the jurisdictional issue here presented.

"First. A forum state acquires no jurisdiction either in rem or in personam merely by the location in that state of property owned by defendant, unless such property is the subject of the litigation. Otherwise it is available only to satisfy a judgment. 433 U.S. 210-13, 97 S. Ct. 2583-84, 53 L. ed. 2d 701-03.

"Second. In order to obtain either in rem or in personam jurisdiction the *defendant* must have certain minimum contacts with the forum state 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' 433 U.S. 203, 97 S. Ct. 2580, 53 L. ed. 2d 697.

"Third. It is the relationship among the defendant, the forum, and the litigation which is the basis for jurisdiction over a nonresident, not their relationship with the *plaintiff*. 433 U.S. 208-09, 97 S. Ct. 2582-83, 53 L. ed. 2d 700-01." (App. D, pp. A. 39-40; emphasis by the Court).

The effect of the Minnesota Court's decisions is that two non-residents of Minnesota may be involved in an accident anywhere in the world and yet Minnesota courts will assume *quasi in rem* jurisdiction over the matter if the plaintiff comes to Minnesota, sues, and garnishes the defendant's insurer's "indebtedness". And, according to the Minnesota Court, Minnesota's assumption of jurisdiction is proper regardless of the fact that the defendant has no minimal contact whatsoever with Minnesota and regardless of the fact that the garnished "indebtedness", the res, is not in any way the subject matter of the litigation between plaintiff and defendant.

Quite clearly, the Minnesota Court has chosen to ignore the teaching of this Court in *Shaffer v. Heitner, supra.*

(e) SUBSTANTIALITY OF FEDERAL QUESTION

As stated above, the Minnesota Supreme Court has determined to adhere to the New York rule of *Seider v. Roth, supra,* and to permit suits against non-residents who have no minimum contacts with the State of Minnesota on a *quasi in rem* jurisdictional basis predicated upon a fictional seizure of fictional property in Minnesota, which property is not the subject matter of the suit. Thus, the Minnesota Court has chosen to disregard the clear holdings of this Court in *International Shoe Co. v. State of Washington, supra,* and in *Shaffer v. Heitner, supra,* as well as *Hanson v. Denckla,* 357 U.S. 235 (1958); *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66 (1954); and *Home Insurance Co. v. Dick,* 281 U.S. 397 (1930), with the result that appellant Rush is deprived of due process of law in violation of the XIVth Amendment. Thus, a very substantial federal question exists as to Mr. Rush.

But Mr. Rush is not alone. Since the Minnesota Court's initial decision, literally scores of *Seider v. Roth* suits have been commenced in Minnesota. Because of the inherent di-

versity-of-citizenship nature of these cases, many of them have been removed to the U.S. District Court where they enhance the burden of that overburdened Court. In New York, the *Seider* rule has spawned a continuing hotbed of litigation resulting in numerous appeals in both federal and state courts in which non-resident defendants have sought (unsuccessfully so far) to obtain due process. New Hampshire has adopted the *Seider* rule solely in retaliation to New York's use of *Seider* against New Hampshire residents. *Forbes v. Boynton*, 113 N.H. 617, 313 A. 2d 129 (1973).

Litigants, such as Mr. Rush, are required to travel long distances to attend their trial and—due to the usual litigation delays—may be required to spend considerable time away from their homes and occupations. Usually, their accident and medical witnesses reside in the *locus delicti* and the testimony of such witnesses can only be presented by cumbersome depositions—if at all. A proper view of the accident scene is impossible. Such litigants are foreclosed from having jurors drawn from the accident area. Furthermore, they may well be subject to the additional expense and hazard of relitigating the same matter in a subsequent *in personam* action in the *locus delicti*. Finally, they may be deprived of the *lex loci delictus* and may be subject to foreign law in the determination of their rights.[2]

Seider has also spawned a storm of academic criticism: e.g., McLaughlin, *New York Trial Practice*, 179 N.Y.L.J. 1 (July 14, 1978); Siegel, *Supplementary Practice Commentary*, McKinney's (New York) C.P.L.R., §5201, pocket part, pp. 15-78 (1974); Zammit, *Quasi in Rem Jurisdiction: Outmoded and Unconstitutional*, 49 St. John L. Rev. 668 (1975); *Comment*, 16 Buffalo L. Rev. 769 (1968); *Comment*, 67 Columbia L. Rev. 550 (1967); *Note, Attachment of Liability Insurance Policies*, 53 Cornell L. Rev. 1108 (1968); *Comment*, 17 Dickinson L. Rev. 653.

[2]For example, in the instant case, if tried in Minnesota, Mr. Rush will lose the benefits of Indiana's guest statute and contributory negligence law, and will be subject to the Minnesota comparative negligence law. *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 221 N. W. 2d 665 (1974).

So far, litigants have sought to establish the *Seider* rule in eleven other states without success.[3] However, if the instant case is not reversed by this Court, it is not improbable that some of these courts (and other courts as well) will incorrectly conclude that *Seider v. Roth* does provide a constitutional basis for acquisition of jurisdiction of no-contact non-residents with the result that hundreds and hundreds of litigants will be deprived of due process. If this appeal is not heard, there certainly will be others with the result that, sooner or later, this Court will undertake to determine the matter.[4] It is respectfully suggested that now is the time to put an end to this pernicious rule by a clear declaration that *Seider v. Roth* and its progeny constitute a constitutionally impermissible exercise of jurisdiction by state courts over residents of other states.

[3]E.g., *Javorek v. Superior Court*, 131 Cal. Rptr. 768, 552 P. 2d 728 (1976); *Sykes v. Beal*, 392 F. Supp. 1089 (D. Conn. 1975); *Kirchman v. Mikula*, 258 So. 2d 701 (La. App. 1972); *Government Employees Insurance Co. v. Lasky*, 454 S. W. 2d 942 (Mo. 1970); *Johnson v. Farmers Alliance Mutual Ins. Co.*, 499 P. 2d 187 (Okl. 1972); *Robinson v. Shearer & Sons, Inc.*, 429 F. 2d 83 (3rd Cir. Pa. 1970); *DeRentiis v. Lewis*, 106 R. I. 240, 258 A. 2d 464 (1969); *Howard v. Allen*, 254 S. C. 455, 176 S. E. 2d 128 (1970); *Housley v. Anaconda Co.*, 19 Utah 2d 124, 427 P. 2d 390 (1967); *Ricker v. Lajoie*, 314 F. Supp. 401 (D. Vt. 1970); *Werner v. Werner*, 84 Wash. 2d 360, 526 P. 2d 370 (1974).

[4]Cf. *Pemberton v. Sperandio*, U. S. Sup. Ct. No. 78-44 (1978), *vacating judgment in Sperandio v. Pemberton*, 568 S. W. 2d 935 (Mo. 1978).

CONCLUSION

Appellants respectfully request the Court to reverse in all respects the judgment of the Supreme Court of Minnesota.

It is respectfully suggested that this is a proper case for summary reversal with direction to dismiss the action. See *Henry v. City of Rock Hill*, 376 U.S. 776 (1964).

Respectfully submitted,

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Appendices

APPENDIX A

[Minnesota District Court, Hennepin County, 4th Judicial District]

JEFFREY D. SAVCHUK,

Plaintiff,

vs.

RANDAL RUSH,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Garnishee.

ORDER

File No. 706126

The above-entitled matter came regularly on for hearing before the undersigned, sitting as Judge of Special Term, on motion of the plaintiff on July 24, 1974 and the Court took said motion under advisement to give defendant and garnishee an opportunity to prepare, serve and file additional motions which were heard on August 15, 1974.

Richard Diamond, Esq., appeared as counsel for and on behalf of plaintiff, and James A. Roegge, Esq., appeared as counsel for and on behalf of defendant and garnishee.

Upon all the files, records and proceedings herein, and upon the arguments of counsel, IT IS ORDERED:

That plaintiff be, and hereby is, granted leave to serve and file a Supplemental Complaint making State Farm

Mutual Automobile Insurance Company, the garnishee herein, a party to the above-entitled action.

That the motions of defendant and garnishee be, and hereby are, denied.

Dated: August 28, 1974.

BY THE COURT:

/s/ DOUGLAS K. AMDAHL
Chief Judge

MEMORANDUM

FACTS

On January 13, 1972 an automobile accident occurred in Elkhart, Indiana. The plaintiff, Jeffrey D. Savchuk, and defendant, Randal Rush, were involved in that accident and the present action arose out of such accident. At the time of the accident plaintiff and defendant were each residents of the State of Indiana. Defendant is still a resident of such state. Plaintiff, who was born October 21, 1953, was living with his parents at the time of the accident. He graduated from Elkhart (Indiana) Senior High School in June of 1972 and worked in Elkhart until June of 1973 when his parent moved to Minnesota and plaintiff moved with them. Plaintiff became employed with Commercial Steel shortly after his arrival in Minnesota and still works for that company. He was married on September 15, 1973 and since that time lives with his wife at 8447 Regent Avenue North, Brooklyn Park, Minnesota. His affidavit filed herein states that he considers Minnesota to be his home of permanent residence and that he has no intention of leaving such state.

Defendant was insured for automobile liability through a policy issued by State Farm Mutual Automobile Insurance Company, which company is licensed to do business in Minnesota. A garnishment summons was served on said insurance company by delivering a copy thereof to the Commissioner of Insurance of the State of Minnesota pursuant to statute. A copy of the garnishment summons and the Summons and Complaint were personally served on defendant in Elkhart County, Indiana.

A form garnishment disclosure was served by mail upon plaintiff's attorney, and said disclosure stated that there was no amount due and owing the judgment debtor by the garnishee and that said garnishee had no property of defendant in its possession.

On July 24, 1974 the undersigned, sitting as Judge of Special Term, heard plaintiff's motion, pursuant to Minnesota Statute 571.51 for leave to file and serve a Supplemental Complaint making the garnishee a party to the action. On the date of such motion, the Court was informed that it was the intention of the attorney for defendant and garnishee to move the Court for other relief and plaintiff's motion was taken under advisement pending the further motions of the defendant and the garnishee. On August 15, 1974 the counsel for defendant and garnishee argued their motion moving the Court "for an Order dismissing the plaintiff's pretended cause of action on the grounds that this Court lacks jurisdiction over the subject matter and the Court lacks jurisdiction over the defendant; that there is insufficiency of process; that there is insufficiency of service of process," and further moved the Court "for an Order dismissing the plaintiff's pretended cause of action on the ground that the defendant is entitled to judg-

ment of dismissal on the pleadings pursuant to Rule 12.03 of the Minnesota Rules of Civil Procedure."

ISSUE

Is the obligation of an insurance company to defend a non-resident insured under an automobile liability insurance policy a garnishable res in Minnesota for the purpose of obtaining quasi in rem jurisdiction in circumstances where the occurrence giving rise to an action occurs out of the State of Minnesota and the plaintiff is a resident of the State of Minnesota?

ARGUMENT

The Supreme Court of the State of Minnesota has not passed upon the question presented by the issue here. However, the United States District speaking through the late Judge Neville in *Rintala v. Shoemaker,* 362 F.Supp. 1044 D.C. Minn. (1973) considered the identical question, and in a thorough opinion determined the question in the affirmative and held that quasi in rem jurisdiction was valid under like circumstances. Judge Neville's analysis of the issue begins with a discussion of *Seider v. Roth,* 17 N.Y. (2d) 111, 269 N.Y.S. (2d) 99, 216 N.E. (2d) 312 (1966) the first reported case determining that the obligation to defend was a garnishable res and continues through a discussion of cases pro and con, and the Minnesota garnishment law which was amended in 1969 by adding subdivision 2 to M.S. 57.41 so that it now reads:

> "Subd. 2. Garnishment shall be permitted before judgment in the following instances only:

> "(1) For the purpose of establishing quasi in rem jurisdiction . . .
>
> "(c) the defendant is a nonresident individual
>
> . . .
>
> "(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

This Court is persuaded by Judge Neville's logic and feels that it could add little, if anything, to his opinion and adopts such opinion as the basis for its determination and adds only the following observation.

In *Turner v. Evers,* 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (supra 1973) Judge Goldberg made the following observation which points up the necessity of basic garnishment law consideration:

> "Our attention has been directed to several cases rejecting *Seider,* and we have found several more. These cases do not hold that there is no jurisdiction in the constitutional sense. Rather they hold that the obligation due from the insurer to the defendant cannot be attached. (Jardine v. Donnelly (1964) 413 Pa. 474, 198 A.2d 513 (pre-Seider perfunctory opinion); Housley v. Anaconda Company (1967) 19 Utah 2d 124, 425 P.2d 390 (post-Seider but does not cite it); DeRentiis v. Lewis (1969) (R.I.) 258 A2d 464 (not 'property' within Rhode Island statute); Howard v. Allen (1970) 254 S.C. 455, 176 S.E.2d 127; (dis-

tinguishes New York from South Carolina attachment statutes); Government Employees Insurance Company v. Lashy (Mo. App. 1970) 454 S.W. 2d 942 ('contingent' under Vermont statute); Kirchman v. Mikula (La. App. 1972) 258 So.2d 701 (interpretation of Louisiana 'direct action' statute.) None of these cases discloses statutes as broad as that in California or a course of interpretation similar to that here. Nor do they reveal the sort of independent parallelism between their local law and New York law like that between California and New York."

Since our garnishment law does now provide for prejudgment garnishment when the garnishee and the debtor are parties to a contract of insurance, the foregoing statement adds much weight to the determination by Judge Neville.

A further issue was raised in the arguments before this Court. Such issue arose by reason of language in Rule 4.04 of the Rules of Civil Procedure for the District Courts, which provides:

> "When quasi in rem jurisdiction has been obtained, a party defending such acts thereby submits personally to the jurisdiction of the court . . ."

The problem is, of course, that if the defendant does not come to the State of Minnesota to defend the action he is not cooperating with the insurance company and may be determined to have no coverage. If he does come to the state to defend the action, he submits, by reason of the foregoing rule, personally to the jurisdiction of the Court and may be subject to an in personam judgment in an

amount over and above the limits of his insurance policy. While this Court feels that the rule would not be effective in this type of situation, it does not have to decide such issue for the reason that the plaintiffs have stipulated that they seek no judgment in an amount larger than that of the policy limits.

D.K A.

APPENDIX B

[Minnesota Supreme Court]

NO 268 (1975)

Hennepin County

JEFFREY D. SAVCHUK,

Respondent,

vs.

45556

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

Sheran, C. J.
Dissenting, Otis, J.
Endorsed
Filed September 10, 1976
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

1. Minn. St. 571.41, subd. 2, was enacted by the legislature to permit garnishment of an insurer's obligation to an insured, even though not due absolutely and without contingency.

2. Rule 4.04(2), Rules of Civil Procedure, which provides in part, "When quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," applies in cases

where jurisdiction is obtained pursuant to § 571.41, subd. 2, only to the extent of the defendant's policy limits.

3. Possible injustice to the defendant in situations where jurisdiction is obtained pursuant to § 571.41, subd. 2, can be controlled by application of the doctrine of forum non conveniens.

Affirmed.

Heard before Sheran, C. J., and Otis, Todd, MacLaughlin, and Scott, JJ., and considered and decided by the court en banc.

OPINION

SHERAN, Chief Justice.

Appeal by defendant, Randal Rush, and garnishee, State Farm Mutual Automobile Insurance Company (State Farm), from an order by the district court granting plaintiff's motion to file and serve a supplemental complaint and denying appellants' motion to dismiss the complaint. We affirm the decision of the trial court for these reasons:

(1) Minn. St. 571.41, subd. 2, was enacted by the legislature to permit garnishment of an insurer's obligation to an insured, even though not due absolutely and without contingency.

(2) Rule 4.04(2), Rules of Civil Procedure, which provides in part, "When quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," applies in cases where jurisdiction is obtained pursuant to §571.41, subd. 2, only to the extent of the defendant's policy limits.

(3) Possible injustice to the defendant in situations where jurisdiction is obtained pursuant to § 571.41, subd. 2, can be controlled by application of the doctrine of forum non conveniens.

The case arose out of a single-car accident which occurred January 13, 1972, in Elkhart, Indiana. The accident involved a car driven by Rush and owned by his father, in which Jeffrey D. Savchuk was a passenger. The Rush car was insured by State Farm. Rush and Savchuk were both residents of Indiana at the time of the accident. Savchuk, a senior in high school when the accident occurred, moved to Minnesota with his parents in June 1973 and is now an employed and married resident of this state.

The instant action was commenced May 28, 1974, when Savchuk served a garnishment summons on State Farm. Service was made by delivery of a copy of the summons to the commissioner of insurance for the state of Minnesota, pursuant to Minn. St. 60A.19. A copy of the garnishment summons, along with copies of the summons and complaint, was also served personally on Rush in Indiana. The complaint alleged negligence and sought $125,000 in damages.

In response to the garnishment summons, State Farm disclosed pursuant to § 571.49 that nothing was due and owing Rush as judgment debtor, Savchuk then moved the trial court for permission to file a supplemental complaint making the garnishee, State Farm, a party to the action pursuant to § 571.51. Rush and State Farm responded by moving for dismissal on the following grounds: Lack of subject-matter jurisdiction, lack of jurisdiction over the defendant, insufficiency of process, and insufficiency of service of process. Since the jurisdictional challenge raised

by the motion to dismiss also raised a question as to the constitutionality of the application on these facts of § 571.41, the attorney general was invited to intervene. That invitation was declined. The respective motions were then heard by the court. His order granting Savchuk's motion for leave to file a supplemental complaint and denying the motion of Rush and State Farm to dismiss precipitated this appeal.

Two main issues are presented: (1) Is the obligation of an insurance company to defend and indemnify a nonresident insured under an automobile liability insurance policy a garnishable res in Minnesota for the purpose of obtaining quasi-in-rem jurisdiction when the incident giving rise to the action occurs outside Minnesota but the plaintiff in the action is a resident of Minnesota? (2) If the obligation of an insurance company to defend and indemnify its insured is a garnishable res, does it seizure and the resultant quasi-in-rem jurisdiction conform with constitutional requirements of due process?

1. Appellants contend that an insurance company's obligation to defend and indemnify its insured cannot constitute a res garnishable under Minn. St. 571.41, subd. 2, because such an obligation is not "due absolutely, and without depending on any contingency," as required by § 571.43(1).[1] In effect, appellants argue that the prejudg-

[1]Minn. St. 571.41, subd. 2, reads in part: "Garnishment shall be permitted before judgment in the following instances only:

"(1) For the purpose of establishing quasi in rem jurisdiction

"(a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or

ment garnishment sanctioned by subd. 2 of Minn. St. 571.41 can be obtained only when the "due absolutely, and without * * * any contingency" language of § 571.43 (1) is first satisfied.

It seems to us that the intent of the legislature in enacting § 571.41, subd. 2, was to specify a limited number of instances in which garnishment (and quasi-in-rem jurisdiction) would be available before judgment, regardless of whether the debt on which the garnishment was predicated was due absolutely.

Several reasons support this conclusion. First, the language of § 571.41, subd. 2, itself indicates that the test for determining the validity of prejudgment garnishment when the garnishee and debtor are parties to a contract of insurance is not whether the debt is due absolutely but rather whether the garnishee "*may* be held to respond" for the claim asserted against the debtor. State Farm's *potential* liability is conceded here, and *potential* liability is all that subd. 2 requires.[2]

"(b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or

"(c) the defendant is a nonresident individual, or a foreign corporation, partnership or association."

Minn. St. 571.43(1) reads: "(1) [No person or corporation shall be adjudged a garnishee by reason of:] (1) Any money or other thing due to the judgment debtor, unless at the time of the service of the summons the same is due absolutely, and without depending on any contingency."

[2]In construing a statute less explicit than the one here in question, the court in Turner v. Evers, 31 Cal. App. Supp. 3d 11, 18, 107 Cal. Rptr. 390, 395 (1973), stated: "* * * We disagree with the proposition that the 'obligation to indemnify requires a valid in personam judgment against the insured,' and hold the obligation to indemnify requires only the *possibility* of a valid judgment either against the insured personally or depriving him of his property." (Italics supplied.)

See, also, Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973).

Second, § 571.41, subd. 2, is both more recent in origin and more specific in language than § 571.43.[3] Because we perceive an irreconcilable conflict between these two statutory provisions, § 571.41, subd. 2, controls.[4] Minn. St. 645.26.

Third, our interpretation of § 571.41, subd. 2, as permitting prejudgment garnishment and the establishment of quasi-in-rem jurisdiction in the circumstances here presented is consistent with two often-stated positions of this court—namely, our interest in providing a forum to residents of this state and our determination in long-arm cases to extend the jurisdiction of our courts to the maximum limits consistent with due process.[5]

We therefore hold that under § 571.41, subd. 2, an automobile insurance company's obligation to defend and indemnify its insured is a res subject to prejudgment garnishment for the purpose of obtaining quasi-in-rem jurisdiction when the incident giving rise to the action occurs

[3]Section 571.43 has remained substantially unchanged since 1957; subd. 2 of § 571.41 was added in 1969. Subd. 2 refers specifically to insurance contracts and seems to contemplate precisely the situation presented here. The fact that § 571.43 speaks of "judgment debtor," while § 571.41, subd. 2, applies in a prejudgment context also suggests a reason for being guided by the latter provision. Note, however, that § 571.41, subd. 3, does indicate that § 571.41, subd. 2, parties are properly to be referred to as judgment debtor and judgment creditor, even though no judgment has yet been obtained.

[4]See, Comment, 1 Wm. Mitchell L. Rev. 161, 176, for an analysis of the statute which reconciles the insurance provision of § 571.41 with the contingency provisions of § 571.43. Our view of the two enactments as irreconcilably in conflict was the view taken by the late Judge Philip Neville in Rintala v. Shoemaker, *supra*.

[5]See, B & J Mfg. Co. v. Solar Industries, Inc., 483 F. 2d 594 (8 Cir. 1973) (applying Minnesota law); State ex rel. Nelson v. Nelson, 298 Minn. 438, 216 N.W. 2d 140 (1974); Franklin Mfg. Co. v. Union Pacific R. Co., 297 Minn. 181, 210 N.W. 2d 227 (1973); Mid-Continent Freight Lines, Inc. v. Highway Trailer Industries, Inc., 291 Minn. 251, 190 N.W. 2d 670 (1971); Hunt v. Nevada State Bank, 285 Minn. 77, 172 N.W. 2d 292 (1969), certorari denied sub. nom. Burke v. Hunt, 397 U.S. 1010, 90 S. Ct. 1239, 25 L. ed. 2d 423 (1970).

outside the state of Minnesota but the plaintiff in the action is a resident of Minnesota.

2. The test for determining the constitutionality of the prejudgment garnishment procedure authorized by Minn. St. 571.41, subd. 2, is threefold: (1) Proper notice must be given to the defendant-insured, affording him adequate opportunity to defend his property; (2) the defendant cannot be exposed to liability greater than the amount of his insurance policy; (3) the procedure may be utilized only by residents of the forum state. Minichiello v. Rosenberg, 410 F. 2d 106, 117 (2 Cir. 1968, 1969); Rintala v. Shoemaker, 362 F.Supp. 1044 (D. Minn. 1973).

Plaintiff was a resident of the state at the time this action was commenced,[6] and proper notice was given.[7] The constitutional issue therefore reduces to a question of defendant's potential liability if the procedure authorized by subd. 2 of § 571.41 is permitted. Appellants argue that Rule 4.04(2), Rules of Civil Procedure, which states in part that "[w]hen quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," means that a defendant in Rush's position[8] would find himself exposed to poten-

[6]Application of Minn. St. 571.41, subd. 2, must be limited to plaintiffs who are residents of the forum state, since without this connection the state would lack sufficient meaningful contact with the suit to justify the exercise of jurisdiction. Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2 Cir. 1969).

[7]Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. ed. 865 (1950), established the notice requirement.

[8]Most automobile insurance policies, including, apparently, the one here, contain a clause which requires the insured to cooperate with the insurer in the defense of any claim. If the insured fails to cooperate, the insurer need not indemnify. The practical effect of the clause means that defendants like Rush must defend in Minnesota or risk losing the right to be indemnified. Ritnala v. Shoemaker, 362 F. Supp. 1044, 1054; Comment, 1 Wm. Mitchell L. Rev. 161, 180.

tially unlimited personal liability in an action in which the plaintiff originally could have obtained only quasi-in-rem jurisdiction. Because of Rule 4.04(2), appellants argue, quasi-in-rem jurisdiction, with liability limited to the policy amount, is transformed into personal jurisdiction with potential liability extended beyond the policy limits.

If appellants correctly state the effect of Rule 4.04(2) in these circumstances, it is obvious that due process would be violated. Rintala v. Shoemaker, 362 F. Supp. 1044, 1054; Podolsky v. Devinney, 281 F. Supp. 488 (S. D. N. Y. 1968). The underlying question here, however, is not the *effect* of Rule 4.04(2), but whether in fact the rule applies to a case of this kind.

New York was the first state to permit a procedure for obtaining jurisdiction similar to the procedure invoked here. Seider v. Roth, 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966). New York also had a rule similar to Rule 4.04 (2), but when the issue of the rule's applicability was raised, the New York Court of Appeals simply held that it did not apply in Seider-type cases. Simpson v. Loehmann, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319 (1968) (per curiam opinion denying reargument). Thus, in New York, even though the defendant proceeds with the defense on the merits, he does not become personally exposed. New Hampshire has reached a similar conclusion. Forbes v. Boynton, 113 N.H. 617, 313 A. 2d 129 (1973). Today we do likewise.

Basic considerations of fairness underlie our decision. The United States Supreme Court has indicated that a defendant must act to purposefully avail himself of the privilege of conducting activities in the forum state before personal jurisdiction over him may be properly asserted.

Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. ed. 2d 1283 (1958). Defendant Rush had engaged in no such voluntary activity; personal jurisdiction over him could not be justified. Plaintiff's reduction of his claim to $50,000, the policy limits, is an implicit recognition of this fact.

But to say that *personal* jurisdiction would not be justified, and to hold, as we do, that Rule 4.04(2) has no application in cases where jurisdiction is obtained pursuant to Minn. St. 571.41, subd. 2, is not to say that *no* jurisdiction over the defendant can be maintained. On the contrary, considerations of fairness suggest the need for quasi-in-rem jurisdiction obtainable via a prejudgment garnishment procedure like that permitted by § 571.41, subd. 2. In cases of this kind, the insurer controls the defense of the case. Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. W. 2d 669 (1967). Minimum contacts sufficient to provide a constitutional basis for the attachment and quasi-in-rem (as distinguished from personal) jurisdiction can be found in the fact that the insurer is present in the state, registered to do business and doing business here, and in the state's legitimate interest in protecting its residents and providing them with a forum in which to litigate their claims.[9] Rintala v. Shoemaker, 362 F. Supp. 1044, 1057; Forbes v. Boynton, 113 N.H 617 623, 313 A. 2d 129, 132.

[9]If a formum is not provided, and the plaintiff is thus denied an opportunity to recover, the state may wind up as the "insurer," paying through its welfare and social assistance programs for the care of an individual injured by the insured. As was stated in Rintala v. Shoemaker, 362 F. Supp. 1044, 1052, the plaintiff in this case is a Minnesota resident, and "[i]t is this state which must protect and care for the plaintiff in the event of indigency [and] this state's services which plaintiff uses."

We therefore held that due process is not violated when jurisdiction is obtained pursuant to § 571.41, subd. 2, provided that (1) proper notice is given to the defendant insured, adequate to give him opportunity to defend his property; (2) that the defendant-insured's liability is limited to the applicable policy limits of his insurance contract; and (3) that the plaintiff in the action is a resident of the state at the time the action is commenced.

3. Appellants' argument that the procedure authorized by § 571.41, subd. 2, constitutes a direct action against the insurer was not raised below. The defendant, not the insurer, is the party sued. There is nothing in the statute which suggests that the insurer should be named as a defendant. Rintala v. Shoemaker, 362 F. Supp. 1044, 1051.

We recognize that other states have rejected the procedure we approve.[10] We further recognize that some critics view Seider-type jurisdiction as a solution which creates more problems than it solves.[11] We limit our discussion of these problems to the following observations:

The potential hardship on defendants who may be required to come long distances to defend claims legiti-

[10]Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970); Howard v. Allen, 254 S. Ct. 455, 176 S.E 2d 127 (1970); State ex rel. Government Employees Ins. Co. v. Lasky, 454 S.W. 2d 942 (Mo. App. 1970); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967); Tessier v. State Farm Mutual Ins. Co., 458 F. 2d 1299 (1 Cir. 1972) (interpreting Massachusetts law); Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 2d 1387 (Okla. 1972); De Rentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969); Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975) (interpreting Connecticut law); Robinson v. O. F. Shearer & Sons, Inc., 429 F. 2d 83 (3 Cir. 1970) (interpreting Federal maritime and Pennsylvania law).

[11]The most persisent and prolific is Professor David D. Siegel, who, since 1966, has written on Seider in annual supplementary commentaries to N.Y. Civ. Prac. § 5201 (McKinney Supp. 1975). Other critical commentary has appeared in Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 Col. L. Rev. 660;

mately brought by Minnesota plaintiffs is reduced by the availability of convenient transportation and by the fact that in many cases the defendant's testimony can be obtained by deposition. Where this is not possible, the hardship and expense of travel will ordinarily be no greater for the defendant than it would be for the injured party should jurisdiction be refused.

A quasi-in-rem judgment against the defendant would apparently not work an estoppel against the defendant if the plaintiff attempts to sue again outside the state of Minnesota to recover amounts beyond the policy limits. Minichiello v. Rosenberg, 410 F.2d 106, 112; Note, 65 Harv. L. Rev. 818, 834. Any hardship to the defendant arising out of a potential second suit against him is no more than has always existed in quasi-in-rem actions. Often, as here, a second suit will be impossible because the statute of limitations has run in the only available alternate forum. Ordinarily, a second suit against a remote defendant whose liability insurance has been exhausted would seem unlikely.

Finally, and most significantly, if jurisdiction is technically proper under § 571.41, subd. 2, but it nonetheless involves inconvenience for the defendant which outweighs the plaintiff's interest in a Minnesota forum and other relevant factors, then the trial court in its discretion can always grant a motion to dismiss on the grounds of forum non conveniens. Willoughby v. Hawkeye-Security Ins. Co.

Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N. Y. U. L. Rev. 1075; Note, 8 B. C. Ind. & Com. L. Rev. 147; Comment, 16 Buffalo L. Rev. 769; Comment, 67 Col. L. Rev. 550; Note, 71 Dickinson L. Rev. 653; Note, 64 Nw. U. L. Rev. 407; Note, 43 St. John's L. Rev. 58; Comment, 11 San Diego L. Rev. 504; Note, 19 Stanford L. Rev. 654; Comment, 5 Sw. U. L. Rev. 417; Comment, 1 Wm. Mitchell L. Rev. 161.

291 Minn. 509, 189 N. W. 2d 165 (1971). In considering such a motion to dismiss, the trial judge would be justified in conditioning his ruling upon the willingness of the plaintiff to satisfy his claims against the defendant upon exhaustion of the policy limits.[12]

For the reasons stated, we conclude that it was not unfair on these facts to require defendant and State Farm to defend this action in Minnesota, and the decision of the trial court is therefore affirmed.

Affirmed.

OTIS, Justice (dissenting).

This is a case wherein two residents of Indiana were involved in an automobile accident in Indiana. One of the drivers (Rush) had purchased an automobile liability policy from State Farm Mutual Automobile Insurance Company. A year and a half after the accident the other Indiana resident (Savchuk) left that state and moved to Minnesota, whereupon he commenced this lawsuit against Rush for injuries suffered in the accident. As Minnesota courts could not constitutionally assert personal jurisdiction over Rush, Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. ed. 2d 1283 (1958),[1] Savchuk sought to acquire quasi-in-rem jurisdiction.[2] However, Rush has no property in Minnesota. Consequently, Savchuk served a garnishment summons upon State Farm in an attempt to garnish any debt due and owing Rush by State Farm. In support of his

[12]Imposition of such a condition would be consistent with the policy expressed in Rintala v. Shoemaker, *supra*, and consistent with our view that this type of jurisdiction should be limited so as to make its exercise fair to both the insurer and the insured.

[1]Rush did not commit any "act by which [he] purposefully avail[ed] himself of the privilege of conducting activities within [Minnesota], thus invoking the benefits and protections of [our] laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. ed. 2d 1283, 1298 (1958).

[2]See, Pennoyer v. Neff, 95 U.S. 714, 24 L. ed. 565 (1877).

action, Savchuk relies upon Minn. St. 571.41, subd. 2, relevant portions of which read:

> "Subd. 2. Garnishment shall be permitted before judgment in the following instances only:
>
> "(1) For the purpose of establishing quasi in rem jurisdiction.
>
> * * * * *
>
> "(c) the defendant is a nonresident individual, or a foreign corporation, partnership or association.
>
> "(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

It is not disputed that Rush is a nonresident individual; thus, subd. 2(1)(c) is satisfied and this case is a proper case for the exercise of quasi in rem jurisdiction.[3] It is also not disputed that State Farm and Rush are parties to a contract of insurance within the meaning of subd. 2(2). The question is whether, and to what extent, any obligation owed by State Farm can provide a means by which Savchuk can obtain quasi-in-rem jurisdiction over Rush.

Quasi-in-rem jurisdiction over a nonresident by the service of a garnishment summons on the defendant's nationwide insurer is a creature of Seider v. Roth, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99, 216 N.E. 2d 312 (1966). As the majority notes, the Seider procedure has been held improper as a matter of Federal maritime law[4] as well as of the law of almost all the states which have considered it.[5] Only an inferior court in one other state has adopted it.[6] Commentary has been highly critical.[7] Even in the state of its birth, the procedure remains only because of the opinion of Judge Charles D. Breitel, in which Judge Bergan concurred, in Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N.E. 2d 669 (1967), the case which reaffirmed Seider. Judge Breitel, appointed to the New York Court of Appeals after Seider, and replacing one of the judges who was in the 4-3 majority in that case, and Judge Bergan, who had dissented in Seider, cast the deciding votes in Simpson for the following reasons:

> "* * * Only a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of that precedent. Yet the theoretical unsoundness of the *Seider* case and the undesirable practical consequences of its rule re-

[3]Subd. 2(1) is merely procedural, defining the types of defendants over which the exercise of quasi-in-rem jurisdiction is proper. Thus, a court must assert personal jurisdiction over a resident defendant who can be found within the state, and cannot proceed quasi in rem. Of course, subd. 2(1) does not say that quasi-in-rem jurisdiction can be asserted over defendant there listed in all cases, for an additional element is needed—something to garnish, i.e., property located within this state. "If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate." Pennoyer v. Neff, 95 U.S. 714, 723, 24 L. ed. 565, 569.

[4]Robinson v. O. F. Shearer & Sons, Inc., 429 F. 2d 83 (3 Cir. 1970).

[5]Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972); State ex rel. Government Employees Ins. Co. v. Lasky, 454 S.W. 2d 942 (Mo. App. 1970); Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 1387 (Okla. 1972); Jardine v. Donnelly, 413 Pa. 474, 198 A. 2d 513 (1964); De Rentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969); Howard v. Allen, 254 S. C. 455, 176 S. E. 2d 127 (1970); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967). See, also, Tessier v. State Farm Mutual Ins. Co., 458 F. 2d 1299 (1 Cir. 1972); Kirchman v. Mikula, 443 F. 2d 816 (5 Cir. 1971); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975); Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970).

[6]Turner v. Evers, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973). The decision cited in the majority opinion, Forbes v. Boynton, 113 N.H. 617, 313 A.2d 129 (1973), is discussed *infra*.

[7]See footnote 11 in the majority opinion.

quire some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation.

"It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy.

* * * * *

"Accordingly, I concur to affirm but only because the institutional stability of a court is more important than any single tolerable error which I may believe it has committed." 21 N. Y. 2d 314, 287 N. Y. S. 2d 640, 234 N.E. 2d 674.

Some of the undesirable practical consequences have already arisen. Thus, New Hampshire has adopted the rule that if the nonresident defendant lives in a state which has adopted Seider—i.e., New York—then that defendant's insurer can be garnished in New Hampshire if the insurer does business there. Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973).[8] On the other hand, if the defendant lives in a state which has rejected Seider—e.g. Connecticut—then his insurer cannot be garnished. Robitaille v. Orciuch, 382 F. Supp. 977 (D. N.H. 1974). In Vaage v. Lewis, 29 App. Div. 2d 315, 288 N. Y. S. 2d 521 (1968), New York was presented with a case in which a

[8]In Forbes the New Hampshire Supreme Court stated: "We are not holding that the *Seider* rule is to be applied generally to all cases of foreign motorists insured by a company with an office in this State and licensed to do business in New Hampshire. We are merely holding that under the circumstances of this case in a suit by a resident of New Hampshire against a resident of New York where the *Seider* rule prevails the trial court properly denied the defendant's motion to dismiss plaintiff's action." 113 N. H. 624, 313 A. 2d 133.

Norwegian resident attempted to garnish in New York the insurer of a North Carolina defendant with respect to an accident which took place in North Carolina. It was held that allowing garnishment in that case would violate the principles of forum non conveniens and due process.[9] In light of the fact that most of our sister states which have considered Seider have rejected it, that the commentary is uniformly critical, that a majority of the court which spawned Seider now believes it to be in error, and mindful of its potentially undesirable consequences, I would decline to adopt it in Minnesota. Whether or not it is authorized by § 571.41, subd. 2(2), in my opinion it is unconstitutional as applied to the defendant in this case.

The majority opinion limits the use of the Seider procedure to residents of Minnesota. This is probably constitutionally required.[10] As Judge Earl Larson said in Adkins v. Northfield Foundry & Machine Co. 393 F. Supp. 1079, 1081 (D. Minn. 1974):

> "One of the principal reasons to limit *Seider* type jurisdictions is that without such limitations, blatant forum shopping would be possible. * * * Further, this limitation is required to give the forum State a recognizable and protectable interest and to prevent an unfair burden that might be placed upon both the nonresident defendant and its insurance company."

[9]See, also, Nationwide Mutual Ins. Co. v. Vaage, 265 F. Supp. 556 (S. D. N. Y. 1967).

[10]Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2 Cir. 1969), affirming 295 F. Supp. 228 (S. D. N. Y. 1968); Vaage v. Lewis, 29 App. Div. 2d 315, 288 N. Y. S 2d 521 (1968); Varady v. Margolis, 303 F. Supp. 23 (S. D. N. Y. 1968); Public Admr. of County of New York v. Unimar Shipping Co., Ltd., 401 F. Supp. 313 (S. D. N. Y. 1975); Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973); Adkins v. Northfield Foundry & Machine Co., 393 Supp. 1079 (D. Minn. 1974).

In Rintala v. Shoemaker, 362 F. Supp. 1044, 1056 (D. Minn. 1973), the late Judge Philip Neville expressed the reasons behind this limitation:

> "The fear is that unless this limit is placed on *Seider* type jurisdiction blatant forum shopping would be possible since many insurance companies, including Aetna, do business in all fifty states. Further, the essential connection between the forum state and the accident at all, the connection which provides the forum state with a recognizable and protectable interest, is that the forum is the residence of the plaintiff. This limit on *Seider* jurisdiction is not only reasonable but it limits any inconvenience which the insurance company might suffer. The only additional state in which garnishment might be had is the resident of the plaintiff. * * *
>
> "* * * On the facts of this case Aetna is simply exposed to an action in one more jurisdiction than it would be otherwise. This certainly is no intolerable burden on it or a similarly situated garnishee."

In the case at bar, plaintiff and defendant were both residents of Indiana when this accident occurred.[11] At that time, under the limitation on Seider, Rush and State Farm were amenable to suit in only one jurisdiction—Indiana. If Savchuk had been a Minnesota resident at that time suit could have been brought in only two states—Indiana and Minnesota. However, if jurisdiction is permissible in

[11]Plaintiffs statement of the case indicates that all of the witnesses and records, as well as a treating physician, are located in Indiana, except for plaintiff's family and two Minnesota physicians who, presumably, treated him after he moved to Minnesota.

this case Rush and State Farm are amenable to suit in all 50 states.

If a motorist in another state drives negligently and injures a Minnesotan, a strong case can be made that this state's interests are sufficiently great to allow our courts to use the Seider procedure for obtaining jurisdiction over the case. As Judge Neville put it, such a motorist "is simply exposed to an action in one more jurisdiction that [he] would be otherwise." 362 F. Supp. 1056. However, allowing a potential plaintiff to move to this state after his cause of action has arisen and to invoke Seider to bring the case to Minnesota means that a plaintiff has a choice of 50 jurisdictions in which to sue. Such a result in my opinion violates due process.[12] Rush did not injure one who was a Minnesota resident on the day of the accident. He should not be forced to defend himself in a Minnesota court.

Under the policies of Schwartz v. Consolidated Freightways Corp. 300 Minn. 487, 491, 221 N. W. 2d 665, 668 (1974)—advancement of Minnesota's governmental interests and application of the better rule of law—Minnesota's comparative negligence law, and not Indiana's contributory negligence law, will apply. Thus, if Rush injures another Indiana resident in Indiana, and that person is able to establish residence in a new jurisdiction, he may use Seider to bring the defendant in and defend, and avoid Indiana's contributory negligence law. Under the majority opinion, if my next-door neighbor is negligently injured on my property he is free to move to any other state where

[12]In the only reported case where this issue was presented, Robitaille v. Orciuch, 382 F. Supp. 977 (D. N. H. 1974), jurisdiction was denied on other grounds. See this discussion of Robitaille and Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973), *supra*.

my homeowners insurer transacts business and force me to defend there.

The majority opinion's answer is that the defendant is free to move to dismiss on grounds of forum non conveniens. However, that presupposes jurisdiction, which I cannot accept.[13]

Accordingly, I would reverse and hold that Minn. St. 571.41, subd. 2(2), is unconstitutional as applied to this case. It would not then be necessary to reach the issue of whether Seider is to become the rule of this state.

---

[13]"The district courts of this state may fairly exercise their discretion in declining to accept jurisdiction of transitory causes of action brought here by citizens or noncitizens of this state who are nonresident when it fairly appears that it would be more equitable that the cause of action be tried in some other available court of competent jurisdiction." Johnson v. Chicago B. & Q. R Co., 243 Minn. 58, 79, 66 N.W. 2d 763, 776 (1954).

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543
June 27, 1977

James F. Roegge, Esq.
Meagher, Geer, Markham, Anderson, et al.
2250 IDS Center
80 South Eighth St.
Minneapolis, MN 55402

RE: Rush and State Farm Mutual Automobile Ins. Co. v. Savchuk, 76-846

Dear Sir:

The Court today entered the following order in the above-entitled case:

The judgment is vacated and the case is remanded to the Supreme Court of Minnesota for further con-

sideration in light of *Shaffer* v. *Heitner*, 433 U.S. — (1977).

Very truly yours,

Michael Rodak, Jr., Clerk
By /s/ Helen Taylor
Assistant Clerk

CC: Richard B. Allyn, Esq.
Solicitor General of Minnesota
515 Transportation Bldg.
St. Paul, MN 55155
Richard I. Diamond, Esq.
Schermer, Schwappach, et al.
1010 Midwest Plaza Bldg.
801 Nicollet Mall
Minneapolis, MN 55402

APPENDIX D

[Minnesota Supreme Court]

No. 268 (1975)
Hennepin County

JEFFREY D. SAVCHUK,

Respondent,

vs.

45556

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

Wahl, J. Dissenting, Otis, Rogosheske, and Peterson, JJ.

Endorsed
Filed October 20, 1978, John McCarthy, Clerk Minnesota Supreme Court

SYLLABUS

The assertion of quasi-in-rem jurisdiction through garnishment of an insurer's obligation to an insured, pursuant to Minn. St. 571.41, subd. 2, as limited by Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624 (1976), is consistent with the due process standards of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. ed. 2d 683 (1977).

Affirmed.

Considered and decided by the court en banc.

OPINION

WAHL, Justice.

On remand from the United States Supreme Court for further consideration in light of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. ed. 2d 683 (1977). For the reasons below, we distinguish Shaffer v. Heitner, *supra*, and hold that the assertion of jurisdiction pursuant to Minn. St. 571.41, subd. 2, as limited by our earlier decision in Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624 (1976), vacated and remanded, 433 U.S. 902, 97 S. Ct. 2964, 53 L. ed. 2d 1086 (1977), is consistent with the standards established by International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. ed. 2d 95 (1945), and its progeny.

The facts are as stated in the earlier decision. Plaintiff, Jeffrey Savchuk, was injured in a single-car accident in Elkhart, Indiana, on January 13, 1973. At the time of the accident, both Savchuk, a senior in high school, and the driver of the car, defendant Randal Rush, were Indiana residents. In June 1973, Savchuk moved with his parents to Minnesota, where he became employed, was married and continues to reside. The personal injury action was commenced in district court, Hennepin County, on May 28, 1974. Savchuk served a garnishment summons on garnishee State Farm Insurance pursuant to Minn. St. 571.41, subd. 2[1] and Minn. St. 60A.19, subd. 1(3). Defendant

[1]Minn. St. 571.41, subd. 2, states: Notwithstanding anything to the contrary herein contained, a plaintiff in any action in a court of record for the recovery of money may issue a garnishee summons before judgment therein in the following instances only:

* * * * *

Rush, still an Indiana resident, was personally served with a copy of the garnishment summons and copies of the summons and personal injury complaint.

By order, the district court denied the motion of Rush and State Farm to dismiss for lack of jurisdiction and insufficient process. They appealed to this court and the order was affirmed. Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624 (1976).

Upholding the constitutionality of Minnesota's garnishment provision, Minn. St. 571.41, subd. 2, this court found that procedure "consistent with two often-stated positions of this court—namely, our interest in providing a forum to residents of this state and our determination in long-arm cases to extend the jurisdiction of our courts to the maximum limits consistent with due process." 245 N.W. 2d 628. The statute was interpreted to satisfy three due process requirements: the provision of adequate notice to defendant-insured; a limitation of liability to insurance policy amounts; and restriction of use to plaintiffs who reside in the forum state. 245 N.W. 2d 628.

(b) If the court shall order the issuance of such summons, if a summons and complaint is filed with the appropriate court and either served on the defendant or delivered to a sheriff for service on the defendant not more than 30 days after the order is signed, and if, upon application to the court it shall appear that:

* * * * *

(2) The purpose of the garnishment is to establish quasi in rem jurisdiction and that

* * * * *

(b) defendant is a nonresident individual, or a foreign corporation, partnership or association.

(3) The garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.

(4) The creditor has been unable to serve upon the debtor the summons and complaint in the main action because the debtor has been inaccessible due to residence and employment in buildings where access is restricted.

On June 24, 1977, the United States Supreme Court vacated that judgment and remanded the case for further consideration in light of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. ed. 2d 683 (1977), which requires, in particular, that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe Co. and its progeny" 97 S. Ct. 2584-85.

The issue now before this court is whether Minnesota's assertion of jurisdiction over out-of-state defendants pursuant to Minn. St. 571.41, subd. 2. as limited by this court in Savchuk, *supra,* satisfies the due process standards set forth in International Shoe Co. and Shaffer.

In Shaffer, *supra,* a nonresident plaintiff filed a shareholder's derivative suit in Delaware state court, naming as defendants Greyhound (a Delaware corporation), Greyhound Lines (its wholly-owned subsidiary incorporated in California), and 28 present or former officers or directors of one or both of the corporations, none of the last being Delaware residents The complaint alleged that the individual defendants had violated their duties to the corporation and its subsidiary by permitting activities in Oregon which made the company liable for substantial antitrust litigation, damages, and criminal contempt fines. The Delaware court obtained jurisdiction by sequestering, via stop-transfer orders, Greyhound stock owned by the individual defendants.[2]

[2]8 Del. Code Ann. § 169 makes Delaware the situs of ownership of stock in Delaware corporations; the rule in the other 49 states places that situs in the state of the owner's residence. 97 S. Ct. 2588 (Stevens, concurring).

Sequestration is a seizure of property used to compel the personal appearance of the nonresident defendant. See, 10 Del. Code Ann. § 366. Although liability is limited to the value of the property seized, potential liability here was $1.2 Million. 97 S. Ct. 2574 n 7.

On appeal to the Delaware Supreme Court, one constitutional challenge to the jurisdiction-by-sequestration procedure was side-stepped:

> "There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. * * * The reason, of course, is that jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum * * *." Greyhound Corporation v. Heitner, 361 A. 2d 225 (Del. 1976), reversed sub nom, Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569.

The United States Supreme Court overruled this categorical in rem/in personam jurisdiction analysis:

> "* * * in order to justify an exercise of jurisdiction *in rem,* the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' The standard for determining whether an exercise of jurisdicion over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in International Shoe [Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. ed. 2d 95 (1945)]. 433 U.S. 207, 97 S. Ct. 2582, 53 L. ed. 2d 699.
>
> "* * * For in cases such as Harris [v. Balk, 198 U.S. 215 (1905)] and this one, the only role played by the property is to provide the basis for bringing the defendant into court. Indeed, the express purpose

of the Delaware sequestration procedure is to compel the defendant to enter a personal appearance. In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction would be equally impermissible." 433 U.S. 209, 97 S. Ct. 2583, 53 L. ed. 2d 701.

Evaluating the sequestration procedure by that standard, the court held Delaware's assertion of jurisdiction to be inconsistent with the due process "minimum contacts" limitation on state power. It found the asserted state interest in supervising the management of local operations to be imperfectly served by the sequestration procedure, which is not expressly limited to corporate fiduciaries and does not even guarantee jurisdiction over all such figures.[3] 433 U.S. 214, 97 S. Ct. 2585-86, 53 L. ed. 2d 704. Though such an interest might support the application of Delaware law to the controversy, choice of law does not necessarily establish jurisdiction over the parties. 433 U.S. 215, 97 S. Ct. 2586, 53 L. ed. 2d 704. Accordingly, judgment was reversed.

Shaffer generally directs the application of International Shoe Co. standards to all assertions of state court jurisdiction, 433 U.S. 212, 97 S. Ct. 2584, 53 L. ed. 2d 703, but the necessary consequences for jurisdiction under Minn. St. 571.41, subd. 2, are not clear. That statute embodies the rule of Seider v. Roth, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99, 216 N. E. 2d 312 (1966). It pro-

[3]Heitner failed to secure jurisdiction over seven of the individual defendants since Delaware law does not require directors to own stock. 8 Del. C. § 141 (b).

vides jurisdiction over a nonresident defendant via garnishment of a contractual obligation, the obligation of the insurance company (doing business in this state) to defend and indemnify the nonresident, insured defendant. Under the statute, as interpreted in our earlier opinion, the nonresident defendant is guaranteed notice, his liability is limited to the policy's face amount and the procedure may be utilized only by residents of the forum state. Savchuk v. Rush, *supra*.

Although Seider v. Roth-type jurisdiction is undoubtedly the most highly controversial and significant contemporary application of the doctrine of quasi-in-rem jurisdiction, it does not appear in the historical discussion in Shaffer.[4]

Since Shaffer, New York courts have split over its implications for Seider v. Roth-type jurisdiction. Several trial courts have held such jurisdiction to be precluded by Shaffer: Torres v. Towmotor Division of Caterpillar, Inc. D. C. — F. Supp. — (E.D. N.Y. 1977) (cited in Alford v. McGaw, 402 N Y.S. 2d 499 (N.Y. App. Div. 1978); Rodriguez v. Wolfe, 401 N.Y.S. 2d 442 (N.Y. Sup. 1978); Attanasio v. Ferre, 401 N.Y.S.2d 685 (N.Y. Sup. 1977); Datz v. Umansky, 399 N.Y.S. 2d 412 (N.Y. Sup. 1977); Kennedy v. Deroker, 398 N.Y.S. 2d 628 (N.Y. Sup. 1977). Other trial courts have held that such jurisdiction does not offend due process: O'Connor v. Lee-Hy Paving Corp. 437

[4]The United States Supreme Court has never considered the constitutionality of the procedure, twice declining to review appellate decisions sustaining the exercise of Seider v. Roth jurisdiction: Minichiello v. Rosenberg, 410 F. 2d 106 (2 Cir. 1968) affirmed on rehearing en banc, 410 F. 2d 117, certiorari denied. 396 U. S. 844, 90 S. Ct. 69, 29 L. ed. 2d 94 (1969), Victor v. Lyon Assoc. Inc., 21 N.Y. 2d 695, 287 N.Y.S. 2d 424, 234 N. E 2d 459 (1967), appeal dismissed for want of a substantial Federal question, sub nom, Hanover Ins. Co. v. Victor, 393 U. S. 7, 88 S. Ct. 44, 21 L. ed. 2d 94 (1968).

F. Supp. 994 (E.D.N.Y. 1977), affirmed, 579 F. 2d 194 (2 Cir. 1978); Wallace v. Target Store, Inc. 400 N.Y.S. 2d 478 (N.Y. Sup. 1977). Most recently, a New York appellate court upheld the exercise of Seider-type jurisdiction in light of Shaffer v. Heitner. Alford v. McGaw, 402 N.Y.S. 2d 499 (N.Y. App. Div. 1978).

This exercise of jurisdiction differs in many important respects from the Delaware sequestration procedure invalidated in Shaffer: First, sequestration did not parallel the asserted state interest in the management of state-chartered corporations—sequestration could be used in *any* suit against a nonresident, and in fact did not guarantee jurisdiction over corporate fiduciaries. By contrast, Minnesota's garnishment procedure specifically premises jurisdiction on attachment of the obligation to respond to claims in the underlying action, Minn. St. 571.41, subd. 2(3). Delaware's interest in supervising its corporations' fiduciaries established only the propriety of Delaware *law*, not necessarily a Delaware *forum*. 433 U.S 214-15, 97 S. Ct. 2586, 53 L. ed. 2d 704-05. Minnesota's legitimate interest in facilitating recoveries for resident plaintiffs[5] not

[5]Cf. Minichiello v. Rosenberg, 410 F. 2d 106 (2 Cir. 1968); McGee v. International Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. ed. 2d 223 (1957); Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927).

A state's interest in providing a forum for its residents is particularly strong where an alternative forum would not have permitted recovery. In the instant case, Indiana's guest statute would have cut off Savchuk's claim. Ind. Stat. § 9-3-3-1. A plaintiff's lack of access to an alternative forum might be a legitimate consideration in justifying exercise of jurisdiction. Shaffer v. Heitner, 433 U. S. 211, 97 S. Ct. 2584, 53 L. ed. 2d 702, n. 37. We also note, in this regard, that by the time the trial court ruled on Savchuk's motion to amend the complaint by making State Farm Mutual a party, the Indiana two-year statute of limitations had run.

One commentator states that a plaintiff's residence "may be deemed an overriding minimum contact" sufficient to justify the exercise of jurisdiction, where no alternative forum exists. Zammit. Quasi-in-Rem Jurisdiction: Outmoded & Unconstitutional? 49 St. John's L. Rev. 668, 682 (1975).

only requires provision of a local forum, but may override traditional choice of law analysis. See, Schwartz v. Consolidated Freightways Corp. of Delaware, 300 Minn. 487, 221 N.W. 2d 665 (1974), appeal after remand, 306 Minn. 564, 237 N.W. 2d 385 (1975) (applying Minnesota comparative negligence law where plaintiff was a Minnesota resident, although accident occurred in contributory-negligence state.) The stock sequestered in Delaware was completely unrelated to the plaintiff's cause of action, constituting only an attachable asset used to compel the defendants' personal appearance. 433 U.S. 208-09, 97 S. Ct. 2585, 53 L. ed. 2d 700-01. In the instant case, the insurer's obligation to defend and indemnify, while theoretically separable from the tort action, has *no* independent value or significance apart from accident litigation. In the accident litigation, however, it is inevitably the focus, determining the rights and obligation of the insurer, the insured, and practically speaking, the victim.

More importantly, because this assertion of state court jurisdiction is, as has long been acknowledged, a "hybrid," its jurisdiction does not rest exclusively on Harris v. Balk.[6]

[6]Most recently in O'Connor v. Lee-Hy Paving Corp., 579 F. 2d 194 (2 Cir. 1978), the Second Circuit Court of Appeals by Judge Friendly distinguished Seider from Harris in light of Shaffer.

"What sharply differentiates these cases from those just hypothesized is that a judgment for the plaintiff will not deprive a defendant of anything substantial that would have been otherwise useful to him. He could not recover, sell or hypothecate the covenant to indemnify; its utility is solely to protect him from liability and in an appropriate case to allow the plaintiff to recover from the insurer * * *. What we said in *Minichiello, supra,* nine years ago *apropos of Harris v. Balk* remains just as true today: '* * * *a Seider judgment would mean simply that liability policies, on which appellants could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured.*' 410 F. 2d 118 (emphasis supplied). Moreover, since the

This court and other courts have evaluated due process challenges to such an assertion of jurisdiction in terms of minimum contacts and fairness. Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624, 629 (1976); Simpson v. Loehmann, 21 N.Y. 2d 305, 311, 287 N.Y.S. 2d 633, 637, 234 N.E. 2d 669, 672 (1967); Rintala v. Shoemaker, 362 F. Supp. 1044, 1053 (D. Minn. 1973). See, Alford v. McGaw, 402 N. Y .S. 2d 499, 502 (N. Y. App. Div. 1978).

Just as Shaffer compels perforation of the *in rem* fiction as a jurisdictional base, we are obligated to consider the practical relationship between the insurer and the nominal defendant here. The insurer's garnished obligation to respond is complemented by the insured's obligation to cooperate. Our limitation of liability to policy limits protects the named defendant from personal exposure. The result is often labeled a procedural alternative to a direct action statute, a preferred alternative which permits insurer anonymity. See, Alford v. McGaw, 402 N. Y. S. 2d 499, 503 (N. Y. App. Div. 1978); See, also, Mehren & Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis," 79 Harv. L. Rev. 1121, 1168. This label does not obviate the due process scrutiny. Cf., Watson v. Employers Li-

insurance policy was purchased to protect against the type of liability which is the subject of the lawsuit and since the obligation to defend clearly encompasses the litigation, *Seider* does not sanction 'the type of *quasi in rem* action typified by *Harris v. Balk* and the present case [sequestration of shares in a Delaware corporation],' where the property which 'serves as the basis for * * * jurisdiction is *completely unrelated* to the plaintiff's cause of action,' *Shaffer v. Heitner, supra*, 433 U. S. 208-09, 97 S. Ct. 2582, 53 L. ed. 2d 700-01 (emphasis supplied.) The fall of *Harris v. Balk* therefore does not necessarily topple *Seider*, * * *."

See, also, Smit, "The Enduring Utility of In Rem Rules: A Lasting Legacy of *Pennoyer v. Neff*," 43 Brooklyn L. Rev. 600, 603-24 (1977), cited in Shaffer, 433 U. S. 208, 97 S. Ct. 2582, 53 L. ed. 2d 700, n. 30 and, Jonnet v. Dollar Sav. Bank of New York, 530 F. 2d 1123, 1138-39 (3 Cir. 1976) (Gibbons, J., concurring), cited in Shaffer, 433 U. S. 205, 97 S. Ct. 2581, 53 L. ed. 2d 698.

ability Assurance Corp. 348 U.S. 66, 75 S. Ct. 166, 99 L. ed. 74 (1954); it does, however, serve to minimize the traditional "jurisdictional bias" in favor of the nominal defendant.

Similarly, limiting the availability of this type of quasi in rem jurisdiction to residents of the forum, Savchuk v. Rush, — Minn. —, 245 N.W. 2d 628 (1976), minimizes the potential for abuse and forum shopping.[7] See, Rintala v. Shoemaker, 362 F. Supp. 1044, 1056 (D. Minn. 1973). Again, we note that the trial court in its discretion can always grant a motion to dismiss on the grounds of forum non-conveniens, should the defendant's burden outweigh the plaintiff's interest in a Minnesota forum and other relevant factors. 245 N. W. 2d 630.

We view as relevant the relationship between the defending parties, the litigation, and the forum state. It cannot be said that Minnesota lacks such minimally-requisite "contacts, ties or relations" to those defending parties as to offend the requirements of due process. In view of our consistent policies of providing a forum to residents of this state and extending our jurisdiction to the maximum limits consistent with due process, we decline to reverse our prior decision.

Accordingly, the order of the district court is affirmed.

OTIS, Justice (dissenting).

The inference to be drawn from this remand is not, in my opinion, that we are free to distinguish Shaffer and reinstate the judgment vacated by the Supreme Court. As I

[7]Although Jeffrey Savchuk was a resident of Indiana at the time of the accident, Savchuk, then 19 years old, accompanied his parents in their move to Minnesota six months later. He has established and continued residency; we find no suggestion of forum-shopping in the record.

construe it, we are simply afforded an opportunity to revise our decision to conform to Shaffer on the assumption we would have reached a different conclusion had Shaffer been decided when we wrote Savchuk. Any other inference would lead to the unlikely conclusion that the Supreme Court was merely delegating to us its responsibility to resolve a difficult constitutional question.

Three specific rules recognized in Shaffer dispose of the jurisdictional issue here presented.

First. A forum state acquires no jurisdiction either in rem or in personam merely by the location in that state of property owned by defendant, unless such property is the subject of the litigation. Otherwise it is available only to satisfy a judgment. 433 U.S. 210-13, 97 S. Ct. 2583-84, 53 L. ed. 2d 701-03.

Second. In order to obtain either in rem or in personam jurisdiction the *defendant* must have certain minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 433 U.S. 203, 97 S. Ct. 2580, 53 L. ed. 2d 697.

Third. It is the relationship among the defendant, the forum, and the litigation which is the basis for jurisdiction over a nonresident, not their relationship with the *plaintiff*. 433 U.S. 208-09, 97 S. Ct. 2582-83, 53 L. ed. 2d 700-01.

1. The majority holds that while the stock sequestered in Shaffer "was completely unrelated to plaintiff's cause of action" the State Farm's obligation to defend and indemnify is "inevitably the focus" in this litigation and determines "the rights and obligations of the insurer, the insured, and practically speaking, the victim." However, this is not the test of jurisdiction, I submit.

Under the explicit holding of Shaffer, whether or not State Farm's contingent liability is a property right is wholly immaterial unless it is the subject matter of the litigation. There is no dispute as to the amount of scope of coverage under the policy. It is no more the subject of the litigation than would be a bank account available in Minnesota to satisfy the judgment. Absent a controversy involving the policy which is justiciable in Minnesota, the mere happenstance of an asset such an insurance being available to satisfy a judgment no longer confers in rem jurisdiction. In other words, the fact defendant is financially responsible in Minnesota is not enough without some other "contacts, ties, or relations" with the state as defined in International Shoe v. Washington.

2. A policy of providing a forum to residents of this state, extending our jurisdiction to the maximum limits consistent with due process is relied on by the majority. This is certainly the legislative intent and one with which I have no quarrel. The problem is that the majority stresses the forum's relationship with the plaintiff, whereas the constitutional test is the contact of the defendant with the forum.

The majority leans on note 37 in Shaffer for the proposition that the unavailability to plaintiff of any other forum is an important factor in acquiring jurisdiction over a nonresident defendant. That note, however, gives no support for such a rule. It merely states "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." 433 U.S. 211, 97 S. Ct. 2584, 53 L. ed. 2d

702, n. 37. Nor can I agree that "Minnesota's legitimate interest in facilitating recoveries for resident plaintiffs not only requires provision of a local forum but may override traditional choice of law analysis." The Schwartz case, cited in reliance for that rule, must be read in the context of Shaffer, now the governing law. No mention is made in Shaffer of the relevance of "minimum contacts" between plaintiff and the forum as modifying the rules set forth in International Shoe.[1]

3. This is an action for personal injuries and not a delaratory judgment suit to construe a liability policy. As in Shaffer the plaintiff did not allege and does not now claim that defendant ever set foot in Minnesota. He does not identify any act related to his cause of action as having taken place in Minnesota. The issue of in personam jurisdiction was extensively discussed in Hanson v. Denckla, 357 U.S. 235, 250-55, 78 S. Ct. 1228, 1238-40, 2 L. ed. 2d 1283, 1296-98 (1958). In that case the United States Supreme Court affirmed the decision of a Delaware court refusing to give full faith and credit to a Florida probate proceeding on the ground the Florida court failed to have jurisdiction over a Delaware trustee holding property which was the subject of the Florida probate proceedings. In affirming the decision of the Delaware court the Supreme Court made these observations:

> "As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714 to the flexible standard of International Shoe Co. v. Washington, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. * * * Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." 357 U.S. 250-51, 78 S. Ct. 1238, 2 L. 3d. 2d 1296.

[1]In Shaffer both the plaintiff and the defendants were nonresidents of the forum.

The court stressed the fact that the trust agreement was executed in Delaware and the settlor was domiciled at that time in Pennsylvania and did not become domiciled in Florida until some years later. The court reached the following conclusion:

> "* * * The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of

its laws." 357 U.S. 253, 78 S. Ct. 1239-40, 2 L. ed. 2d 1298.

* * * * *

"It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a non sequitur." 357 U.S. 254, 78 S. Ct. 1240, 2 L. ed. 2d 1298.

* * * * *

"* * *It does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction." 357 U.S. 254, 78 S. Ct. 1240, 2 L. ed. 2d 1298.

4. When plaintiff was injured, he and defendant were both Indiana residents, driving on an Indiana highway in a car registered in Indiana and insured in Indiana by a policy written in that state. The record discloses no relationship between defendant and the State of Minnesota. The fact that his insurer also does business in Minnesota is not, of course, attributable to any activity on the part of defendant. To paraphrase the words of Mr. Justice Marshall in Shaffer, defendant has simply had nothing to do with the State of Minnesota and had no reason to expect to be haled before a Minnesota court. By acquiring an insurance policy with State Farm he did not surrender his right to be brought to judgment only in a state with which

he had minimum contacts. Mr. Justice Stevens' comments in his concurring opinion apply with equal force to the role of defendant's liability insurance in this case:

"One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction. * * * * * If its procedure were upheld, Delaware would, in effect, impose a duty of inquiry on every purchaser of securities in the national market. For unless the purchaser ascertains both the state of incorporation of the company whose shares he is buying, and also the idiosyncrasies of its law, he may be assuming an unknown risk of litigation." 433 U.S. 218-19, 97 S. Ct. 2587-88, 53 L. 3d. 2d 706-07.

Shaffer reiterates the rule laid down in International Shoe and applies it to in rem jurisdiction:

"Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." 326 U.S. 319, 66 S. Ct. 160, 90 L. ed. 2d 104.

Defendant himself, it is conceded, has not simply had minimum contacts with Minnesota. He has had no contacts with Minnesota. Under such circumstances it is not my notion of fair and orderly administration of justice to

require a citizen of Indiana, because he carried liability insurance, to come to Minnesota to defend himself against the claims of another Indiana citizen who has had no contact with this state until his parents elected for undisclosed reasons to make Minnesota his residence. As was noted in the prior dissent:

> "Plaintiff's statement of the case indicates that all of the witnesses and records, as well as a treating physician, are located in Indiana, except for plaintiff's family and two Minnesota physicians who, presumably, treated him after he moved to Minnesota." — Minn. —, 245 N.W. 2d 644, 633 n. 11 (1976).

Our long-arm statute is designed essentially to give redress to bona fide citizens of Minnesota who have suffered a wrong by the harmful intrusion of a nonresident into this jurisdiction. It is reasonable to expect nonresidents who do business here or who otherwise enjoy the privileges and protection of our laws to respond in our courts for injury caused citizens of this state by virtue of their activities. However, where, as here, the injury occurred in a foreign state at a time when Minnesota had no connection with either the parties or the cause of action, I fail to see the logic or the beneficial public policy of encouraging after-the-fact forum shopping to secure retroactive jurisdiction in this state.

Accordingly I would reverse.

ROGOSHESKE, Justice (dissenting).

I join in the dissent of Mr. Justice Otis.

PETERSON, Justice (dissenting).

I join in the dissent of Mr. Justice Otis.

APPENDIX E

STATE OF MINNESOTA, SUPREME COURT

JEFFREY D. SAVCHUK,

Respondent,

vs.

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

Pursuant to the Mandate of the U.S. Supreme Court dated July 29, 1977, the judgment of this Court dated and entered on September 27, 1976, be and hereby is vacated. Pursuant to an order of this Court heretofore duly made and entered in this cause on October 20, 1978, it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellants herein the sum and amount of Two Hundred Sixty-Nine and 78/100 DOLLARS, ($269.78) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed November 3, 1978.

BY THE COURT

Attest:

JOHN McCARTHY

Clerk

APPENDIX F

(Title of Cause.)

45556

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that defendant Randal Rush and the garnishee State Farm Mutual Automobile Insurance Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Minnesota Supreme Court, which judgement was entered on November 3, 1978, and which judgment reaffirmed a previous judgment of the Minnesota Supreme Court of September 27, 1976, and which judgment was vacated and remanded by the United States Supreme Court pursuant to the Order of the United States Supreme Court of June 27, 1977.

This appeal is taken pursuant to 28 U. S. C. §1257(2) and, alternately, 28 U. S. C. §2103.

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
By O. C. ADAMSON, II
JAMES F. ROEGGE
2250 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Attorneys for Appellants
(612) 338-0661

STATE OF MINNESOTA

ss

COUNTY OF HENNEPIN

AFFIDAVIT OF SERVICE BY MAIL

Gay L. Cleary, being first duly sworn, deposes and says:

That on the 17th day of November, 1978, she served the attached Notice of Appeal to the Supreme Court of the United States upon the following attorneys representing the parties as indicated, by depositing a true and correct copy thereof in the U.S. Mail in the City of Minneapolis, Hennepin County, Minnesota, with postage prepaid, in an envelope directed and addressed to said attorneys.

Edward H. Borkon, Esq.
Schermer, Schwappach, Borkon & Ramstead, Ltd.
Attorneys at Law
485 Pillsbury Building
608 Second Avenue South
Minneapolis, Minnesota 55402
Attorneys for Appellee

Richard B. Allyn, Esq.
Solicitor General
Minnesota Office of the Attorney General
515 Transportation Building
Saint Paul, Minnesota 55155

/s/ GAY L. CLEARY

Subscribed and sworn to before me this 17 day of November, 1978.

/s/ VIVIAN L. FLATEN
Notary Public
Hennepin County, Minn.

My Commission Expires Dec. 15, 1978

Supreme Court, U. S.
FILED
APR 5 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-952

RANDAL RUSH, et al.,

Appellants,

vs.

JEFFREY D. SAVCHUK,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT FILED DECEMBER 13, 1978
PROBABLE JURISDICTION NOTED FEBRUARY 20, 1979

1979—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

Page

Chronological List of Important Dates A-1
Garnishment Summons, Notice to Defendant (Judgment Debtor), and Affidavit of Service A-2
Garnishment Disclosure A-4
Summons, Complaint, and Affidavit of Service A-5
Notice of Motion and Motion [for Leave to File Supplemental Complaint], and Supporting Affidavit .. A-8
Notice of Motion and Motion [for a Dismissal on the Ground of Lack of Jurisdiction], and Supporting Affidavits A-10
Affidavit A-16
Order and Memorandum Opinion A-17
Summons, Supplemental Complaint, and Affidavit of Service A-23
Notice of Appeal [to Minnesota Supreme Court] A-28
Opinion Minnesota Supreme Court of September 27, 1976 [Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624] A-30
Judgment A-47
Notice of Appeal to the Supreme Court of the United States A-48
Order of Supreme Court of the United States A-49
Opinion of Minnesota Supreme Court of October 20, 1978 [Savchuk v. Rush, — Minn. —, 272 N.W. 2d 888] A-52
Judgment A-69
Notice of Appeal to the Supreme Court of the United States A-70

CHRONOLOGICAL LIST OF IMPORTANT DATES

July 19, 1974: Garnishment Summons and Motion to File Supplemental Complaint filed

July 23, 1974: Garnishment Disclosure and Motion to Dismiss filed

August 28, 1974: Order and Memorandum Opinion filed

November 8, 1974: Supplemental Complaint filed

November 18, 1974: Notice of Appeal to Minnesota Supreme Court filed

September 10, 1976: Opinion of Minnesota Supreme Court filed

September 27, 1976: Judgment of Minnesota Supreme Court entered

November 11, 1976: Notice of Appeal to United States Supreme Court filed

July 27, 1977: Order of United States Supreme Court

October 20, 1978: Opinion of Minnesota Supreme Court filed

November 3, 1978: Judgment of Minnesota Supreme Court entered

November 20, 1978: Notice of Appeal to United States Supreme Court filed

December 13, 1978: Jurisdictional Statement filed

February 20, 1979: Probable Jurisdiction noted

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

JEFFREY D. SAVCHUK,

Plaintiff,

vs.

RANDAL RUSH,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Garnishee.

GARNISHMENT SUMMONS

THE STATE OF MINNESOTA, To the above named Garnishee:

You are hereby summoned and required to serve upon the plaintiff or his attorney, within 20 days after the service of this Summons upon you, a written disclosure under oath, touching your indebtedness to the defendant, Randal Rush, Route 8, Meadowbrook Lane, Elkhart, Indiana 46514, above named, and any property money, or effects of said defendant in your possession or under your control, which disclosure need not exceed 110 percent of the amount of the plaintiff's prayer for damages in the main action herein, which prayer for damages is in the sum of One Hundred Twenty-five Thousand and no/100 ($125,000.00) Dollars; and you are hereby required to retain in your possession such property, money, and effects in an amount not exceeding 110 percent of the amount of such prayer.

Dated: May 28, 1974.

SCHERMER, SCHWAPPACH, BORKON & RAMSTEAD, LTD.
By /s/ IRVIN E. SCHERMER
Attorneys for Plaintiff
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
333-7155

NOTICE TO DEFENDANT (JUDGMENT DEBTOR)

TO: RANDAL RUSH, Judgment Debtor:

SIR: Take notice that a Garnishment Summons, of which the foregoing is a true copy, and which is herewith served upon you, was personally served upon State Farm Mutual Automobile Insurance Company, the Garnishee named therein, by delivering a copy thereof to the Commissioner of Insurance for the State of Minnesota, as the attorney for said Garnishee, at St. Paul, Minnesota, County of Ramsey, on the 28th day of May, 1974.

SCHERMER, SCHWAPPACH, BORKON & RAMSTEAD, LTD.
By /s/ IRVIN E. SCHERMER
Attorneys for Plaintiff
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
333-7144

AFFIDAVIT OF SERVICE

STATE OF INDIANA

SS

ELKHART COUNTY

The undersigned being duly sworn, deposes and says that: he is a duly appointed and acting officer of the Elkhart County Sheriff's Department in and for the County of Elkhart, State of Indiana and that on June 6, 1974 at 6:15 P.M. he did in the City of Elkhart State of Indiana transmit the contents of Garnishment Summons to Randal Rush at Rt. 8 Meadowbrook Lane, by reading to him and delivering copy of same to him.

This officer is over 21 years of age and not interested in this controversy.

/s/ SGT. BOB WILLIAMS

[Jurat omitted in printing]

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

[Title omitted in printing]

GARNISHMENT DISCLOSURE

I am the ———— of the garnishee herein, and duly authorized to disclose for said garnishee.

On ————, 19—, the time of the service of the garnishee summons herein on said garnishee:

(1) There was due and owing the judgment debtor above named from said garnishee, the sum of $0.00.

* * * * *

STATE FARM MUTUAL AUTOMOBILE CO.
By /s/ JOHN CARRUTH

[Jurat and affidavit of service omitted in printing]

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

[Title omitted in printing]

SUMMONS

THE STATE OF MINNESOTA TO THE ABOVE NAMED DEFENDANT:

You, the above named defendant, are hereby summoned and required to answer the Complaint of the plaintiff in the above-entitled action, a copy of which Complaint is hereto attached and herewith served upon you, and to serve a copy of your Answer thereto upon the subscribers at their offices at 1010 Midwest Plaza Building, 801 Nicollet Mall, in the City of Minneapolis, County of Hennepin, State of Minnesota, within twenty (20) days after the service of this Summons upon you, exclusive of the day of such service, and, if you fail to answer the said Complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in said Complaint.

Dated: July 12, 1974.

SCHERMER, SCHWAPPACH, BORKON & RAMSTEAD, LTD.
By /s/ JOHN D. MARIANI
Attorneys for plaintiff
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
333-7155

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

[Title omitted in printing]

COMPLAINT

Plaintiff for his complaint and cause of action against the defendant, herein states and alleges:

I.

On January 13, 1972, defendant so carelessly and negligently operated a motor vehicle on Elkhart County Road No. 6 in Indiana as to cause the same to be involved in an accident, thereby causing plaintiff, who was there and then a passenger in said automobile, to maintain the injuries and damages hereinafter described.

II.

As a direct and proximate result of the negligent and careless conduct of the defendant, as above described, plaintiff sustained bodily injuries, some of which may be

permanent; was caused to incur medical expense to treat such injuries, and may be required to incur such expenses in the future; was caused to become disabled and may have sustained a permanent impairment of his ability to work

III.

That as a result of the foregoing allegations, plaintiff has been damaged in the sum of One Hundred Twenty-five Thousand and no/100 ($125,000.00) Dollars.

WHEREFORE, plaintiff prays for judgment against the defendant in the sum of One Hundred Twenty-five Thousand and no/100 ($125,000.00) Dollars. together with his costs and disbursements herein.

Dated: July 12, 1974.

SCHERMER, SCHWAPPACH, BORKON & RAMSTEAD, LTD.
By /s/ JOHN D. MARIANI
Attorneys for Plaintiff
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
333-7155

AFFIDAVIT OF SERVICE

STATE OF INDIANA
SS
ELKHART COUNTY

The undersigned being duly sworn, deposes and says that: he is a duly appointed and acting officer of the Elkhart

County Sheriff's Department in and for the County of Elkhart, State of Indiana; and that on July 19, 1974 he did in the County of Elkhart, State of Indiana transmit the contents of a Summons and Complaint issued from the 4th Judicial District Court, of Hennepin County, Minnesota, in Cause entitled Jeffrey D. Savchuk vs Randal Rush by leaving a copy at Route # 6 Box 282 Elkhart, (Meadowbrook Lane). Then by mailing a true copy of Summons and Complaint to same on July 19, 1974.

This officer is over 21 years of age and not interested in this controversy.

/s/ SGT. JOHN DOWNING
[Title omitted in printing]

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

[Title omitted in printing]

NOTICE OF MOTION AND MOTION

TO: Defendant above-named and James Roegge, attorney for defendant and State Farm Mutual Automobile Insurance Company, garnishee.

Please take notice that on the 24th day of July, 1974 at 9:30 a.m., or as soon thereafter as counsel can be heard, the Courthouse in the City of Minneapolis, County of Hennepin, State of Minnesota, plaintiff will move the above-named Court, at a Special Term thereof, pursuant to the Minnesota Statute Section 571.51 for leave to serve and file a supplemental Complaint making State Farm Mutual Automobile Insurance Company a party to the above-entitled action. Said Motion shall be based on the records and proceedings herein, plus the Affidavit herein.

Dated this 18th day of July, 1974.

SCHERMER, SCHWAPPACH, BORKON & RAMSTEAD, LTD.
By /s/ JOHN D. MARIANI
Attorney for Plaintiff
1010 Midwest Plaza Building
Minneapolis, Minnesota 55402

AFFIDAVIT

STATE OF MINNESOTA
ss:
COUNTY OF HENNEPIN

JOHN D. MARIANI deposes and says that he is one of the attorneys for the plaintiff. This affiant states that on May 29, 1974 service of the Garnishment Summons was made upon State Farm Mutual Automobile Insurance Company through the Department of Commerce, Insurance Division of the State of Minnesota, St. Paul, Minnesota. This affiant further states that a copy of said Garnishment Summons and the Summons and Complaint were served upon defendant personally through the Elkhart County sheriff's office, Goshen, Indiana, on June 6, 1974 upon Randal Rush the defendant. This affiant further states that on July 10, 1974, he received a Garnishment Disclosure dated July 3, 1974 from James F. Roegge, attorney at law, 2250 IDS Center, Minneapolis, Minnesota, stating that there were no monies due and owing to said defendant from

said garnishee. The remainder of said Garnishment Disclosure questions were unanswered and the Garnishment Disclosure was unsigned and not notarized. This affiant further states that said Garnishment Disclosure was defective and does not intend to waive any rights with regard to such defective Garnishment Disclosure.

This affiant sayeth not further except that this Affidavit is made in support of plaintiff's Motion to file a Supplemental Complaint.

/s/ JOHN D. MARIANI

[Jurat and affidavit of service omitted in printing]

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

[Title omitted in printing]

NOTICE OF MOTION AND MOTION

TO: PLAINTIFF ABOVE NAMED and JOHN D. MARIANI, HIS ATTORNEY

YOU WILL PLEASE TAKE NOTICE that the above named defendant, through his undersigned attorney, will bring the attached Motion on for hearing at a Special Term of the above named court to be held at the Courthouse in the City of Minneapolis, State of Minnesota on

the 31st day of July, 1974 at 9:30 A.M. or as soon thereafter as counsel can be heard.

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
By /s/ JAMES F. ROEGGE
Attorneys for Defendant
2250 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
338-0661

MOTION

Defendant, above named, through his undersigned attorney hereby moves the court for an Order dismissing the plaintiff's pretended cause of action on the grounds that this court lacks jurisdiction over the subject matter and the court lacks jurisdiction over the defendant; that there is insufficiency of process; that there is insufficiency of service of process.

Defendant further moves the court for an Order dismissing the plaintiff's pretended cause of action on the ground that the defendant is entitled to judgment of dismissal on the pleadings pursuant to Rule 12.03 of the Minnesota Rules of Civil Procedure.

The above motions are made on the grounds that the Complaint avers that the motor vehicle accident and alleged negligence occurred in Elkhart County Indiana and no part of the alleged tort occurred in the State of Minnesota. The defendant is a resident of the State of Indiana. The plaintiff attempted service of process by personal ser-

vice upon the defendant in the State of Indiana; therefore, this court lacks jurisdiction over the subject matter and over the defendant in regard to the plaintiff's action.

Said motion is based upon the Minnesota Rules of Civil Procedure and in particular Rule 12 thereof.

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
By /s/ JAMES F. ROEGGE
Attorneys for Defendant
2250 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
338-0661

AFFIDAVIT

STATE OF INDIANA
SS:
COUNTY OF ELKHART

Randall K. Rush, being first duly sworn, deposes and says:

1. That he is the defendant in the above lawsuit.

2. That this lawsuit arises out of an automobile accident which occurred on January 13, 1972 in the City of Elkhart. County of Elkhart, State of Indiana.

3. That your affiant is presently twenty (20) years of age, date of birth, October 5, 1953.

4. That at all times material herein, including at the time of said automobile accident and at the present time,

your affiant, the defendant in the above lawsuit, has continuously been a resident of the State of Indiana.

Further your affiant sayeth not save that this affidavit is made in support of his motion to dismiss.

/s/ RANDALL K. RUSH
[Jurat omitted in printing]

AFFIDAVIT

STATE OF MINNESOTA
SS
COUNTY OF HENNEPIN

James F. Roegge being first duly sworn deposes and says:

1. That he is one of the attorneys representing the defendant and also the garnishee in the above captioned matter.

2. That this lawsuit as and between the plaintiff and defendant arises out of an automobile accident which occurred on January 13, 1972 in the City of Elkhart, County of Elkhart, State of Indiana.

3. That on information and belief and as the affidavit of the Elkhart County Sheriff's Office so indicates, the defendant Randal Rush was at the time of said accident and at all times material herein a resident of the State of Indiana.

4. That the plaintiff has elected to prosecute an action for personal injuries within the State of Minnesota; that plaintiff alleges or holds himself out to be a resident

of the State of Minnesota; that plaintiff apparently is attempting to obtain jurisdiction over the out of state defendant by means of a garnishment summons served upon the garnishee above named.

5. That on June 17, 1974 Arthur B. Geer of your affiant's office corresponded with Mr. Irvin E. Schermer, counsel for plaintiff, indicating that your affiant's office had received the file from the garnishee and that your affiant intended to raise a motion pertaining to the jurisdictional question and that the office of plaintiff's counsel would be contacted within a short time thereafter.

6. That within a few days following June 17, 1974 your affiant did call the offices of plaintiff's counsel and requested to speak with Mr. Schermer; that Mr. Schermer was absent from the office and that your affiant then asked to speak with Mr. Schermer's secretary to determine if a Summons and Complaint or Garnishment Summons had been served upon the Indiana defendant, Randal Rush; that your affiant was informed that their file did not show any return of service and therefore your affiant concluded that the defendant Randal Rush had not been served with process.

7. That from a review of the court file. your affiant is now informed that in fact a Garnishment Summons was served upon the defendant Randal Rush on June 6, 1974.

8. That in response to the Garnishment Summons your affiant's office did prepare a Garnishment Disclosure executed by John Carruth of the garnishee insurance company; that said Garnishment Disclosure indicates that zero dollars is due and owing to the defendant Randal Rush.

9. That on information and belief the defendant Randal Rush is an insured under a policy of insurance, policy number 3198142F2314 naming Lewis C. Rush, father of the defendant Randal Rush, with liability limits of $50/100,000.

10. That the above policy of insurance is a standard automobile liability policy providing that the garnishee will pay on behalf of the insured any sums which the insured shall become legally obligated to pay as a result of injuries, etc. arising out of the use of the owned automobile, etc.

11. That your affiant is now advised that the defendant Randal Rush was served with process, to wit, a Garnishment Summons and a Summons and Complaint in an action captioned as the above pleadings on July 19, 1974.

12. That your affiant's office has served upon plaintiff's counsel and filed with this court a Motion to dismiss the above action in its entirety to be heard at a Special Term of this court on the 31st day of July, 1974.

Further your affiant sayeth not save that this affidavit is made in opposition to the plaintiff's Motion for leave of this court to file a Supplemental Complaint against the above garnishee.

/s/ JAMES F. ROEGGE

[Jurat omitted in printing]

[Affidavits of service omitted in printing]

STATE OF MINNESOTA DISTRICT COURT
County of Hennepin Fourth Judicial District

[Title omitted in printing]

AFFIDAVIT

Jeffrey D. Savchuk, being first duly sworn, deposes and states:

That he is the plaintiff in the above-entitled action, which action arises out of an automobile accident occurring on January 13, 1972 in Elkhart, Indiana, and makes this Affidavit of his own personal knowledge in support of plaintiff's Motion to serve and file a Supplemental Complaint to include State Farm Mutual Automobile Insurance Company as garnishee in the above-entitled proceedings; and

That your affiant was born on October 21, 1953 and is presently Twenty (20) years of age; and

That on the date of said accident and for approximately two (2) years prior thereto your affiant lived with his parents at 18 Lantern Lane, Elkhart, Indiana and attended Elkhart Senior High School; and

That in June of 1972, your affiant graduated from Elkhart Senior High School and worked in Elkhart, Indiana until June of 1973; and

That in June of 1973 your affiant's father was transferred to Minneapolis, Minnesota and your affiant thus moved to Minnesota with his parents at that time; and

That upon moving to Minnesota your affiant obtained a job with Commercial Steel and worked and continues to work for said company; and

That your affiant was married on September 15. 1973

and since that time has lived and continues to live with his wife at 8447 Regent Avenue North, Apartment 305, Brooklyn Park, Minnesota; and

That your affiant considers Minnesota to be his state of permanent residence and has no intention of leaving said state; and

That your affiant has substantial connections with the State of Minnesota, including the purchase of a truck in the State of Minnesota in March of 1974, bank account and checking account in the State of Minnesota and payment of Minnesota State income taxes in 1973 and will continue to have significant and continuing contact with the State of Minnesota.

Further affiant sayeth not.

Dated this 11 day of August, 1974.

/s/ JEFFREY D. SAVCHUK

[Jurat and affidavit of service omitted in printing]

STATE OF MINNESOTA DISTRICT COURT
County of Hennepin Fourth Judicial District

[Title omitted in printing]

ORDER

File No. 706126

The above-entitled matter came regularly on for hearing before the undersigned, sitting as Judge of Special Term, on motion of the plaintiff on July 24, 1974 and the Court took said motion under advisement to give defendant and garnishee an opportunity to prepare, serve and

file additional motions which were heard on August 15, 1974.

Richard Diamond, Esq., appeared as counsel for and on behalf of plaintiff, and James A. Roegge, Esq., appeared as counsel for and on behalf of defendant and garnishee.

Upon all the files, records and proceedings herein, and upon the arguments of counsel, IT IS ORDERED:

That plaintiff be, and hereby is, granted leave to serve and file a Supplemental Complaint making State Farm Mutual Automobile Insurance Company, the garnishee herein, a party to the above-entitled action.

That the motions of defendant and garnishee be, and hereby are, denied.

Dated: August 28, 1974.

BY THE COURT:

/s/ DOUGLAS K. AMDAHL
Chief Judge

MEMORANDUM

FACTS

On January 13, 1972 an automobile accident occurred in Elkhart, Indiana. The plaintiff, Jeffrey D. Savchuk, and defendant, Randal Rush, were involved in that accident and the present action arose out of such accident. At the time of the accident plaintiff and defendant were each residents of the State of Indiana. Defendant is still a resident of such state. Plaintiff, who was born October 21, 1953, was living with his parents at the time of the accident. He

graduated from Elkhart (Indiana) Senior High School in June of 1972 and worked in Elkhart until June of 1973 when his parents moved to Minnesota and plaintiff moved with them. Plaintiff became employed with Commercial Steel shortly after his arrival in Minnesota and still works for that company. He was married on September 15, 1973 and since that time lives with his wife at 8447 Regent Avenue North, Brooklyn Park, Minnesota. His affidavit filed herein states that he considers Minnesota to be his home of permanent residence and that he has no intention of leaving such state.

Defendant was insured for automobile liability through a policy issued by State Farm Mutual Automobile Insurance Company, which company is licensed to do business in Minnesota. A garnishment summons was served on said insurance company by delivering a copy thereof to the Commissioner of Insurance of the State of Minnesota pursuant to statute. A copy of the garnishment summons and the Summons and Complaint were personally served on defendant in Elkhart County, Indiana.

A form garnishment disclosure was served by mail upon plaintiff's attorney, and said disclosure stated that there was no amount due and owing the judgment debtor by the garnishee and that said garnishee had no property of defendant in its possession.

On July 24, 1974 the undersigned, sitting as Judge of Special Term, heard plaintiff's motion, pursuant to Minnesota Statute 571.51 for leave to file and serve a Supplemental Complaint making the garnishee a party to the action. On the date of such motion, the Court was informed that it was the intention of the attorney for defendant and

garnishee to move the Court for other relief and plaintiff's motion was taken under advisement pending the further motions of the defendant and the garnishee. On August 15, 1974 the counsel for defendant and garnishee argued their motion moving the Court "for an Order dimissing the plaintiff's pretended cause of action on the grounds that this Court lacks jurisdiction over the subject matter and the Court lacks jurisdiction over the defendant; that there is insufficiency of process; that there is insufficiency of service of process," and further moved the Court "for an Order dismissing the plaintiff's pretended cause of action on the ground that the defendant is entitled to judgment of dismissal on the pleadings pursuant to Rule 12.03 of the Minnesota Rules of Civil Procedure."

ISSUE

Is the obligation of an insurance company to defend a non-resident insured under an automobile liability insurance policy a garnishable res in Minnesota for the purpose of obtaining quasi in rem jurisdiction in circumstances where the occurrence giving rise to an action occurs out of the State of Minnesota and the plaintiff is a resident of the State of Minnesota?

ARGUMENT

The Supreme Court of the State of Minnesota has not passed upon the question presented by the issue here. However, the United States District speaking through the late Judge Neville in *Rintala v. Shoemaker*, 362 F.Supp. 1044 D.C. Minn. (1973) considered the identical question, and in a thorough opinion determined the question in the affirmative and held that quasi in rem jurisdiction was valid under like circumstances. Judge Neville's analysis of the issue begins with a discussion of *Seider v. Roth*, 17 N.Y. (2d) 111, 269 N.Y.S. (2d) 99, 216 N.E. (2d) 312 (1966) the first reported case determining that the obligation to defend was a garnishable res and continues through a discussion of cases pro and con, and the Minnesota garnishment law which was amended in 1969 by adding subdivision 2 to M.S. 57.41 so that it now reads:

> "Subd. 2. Garnishment shall be permitted before judgment in the following instances only:
>
> "(1) For the purpose of establishing quasi in rem jurisdiction . . .
>
> "(c) the defendant is a nonresident individual
>
> . . .
>
> "(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

This Court is persuaded by Judge Neville's logic and feels that it could add little, if anything, to his opinion and adopts such opinion as the basis for its determination and adds only the following observation.

In *Turner v. Evers*, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (supra 1973) Judge Goldberg made the following observation which points up the necessity of basic garnishment law consideration:

"Our attention has been directed to several cases rejecting *Seider*, and we have found several more. These cases do not hold that there is no jurisdiction in the constitutional sense. Rather they hold that the obligation due from the insurer to the defendant cannot be attached. (Jardine v. Donnelly (1964) 413 Pa. 474, 198 A.2d 513 (pre-Seider perfunctory opinion); Housley v. Anaconda Company (1967) 19 Utah 2d 124, 425 P.2d 390 (post-Seider but does not cite it); DeRentiis v. Lewis (1969) (R.I.) 258 A2d 464 (not 'property' within Rhode Island statute); Howard v. Allen (1970) 254 S.C. 455, 176 S.E.2d 127; (distinguishes New York from South Carolina attachment statutes); Government Employees Insurance Company v. Lashy (Mo. App. 1970) 454 S.W. 2d 942 ('contingent' under Vermont statute); Kirchman v. Mikula (La. App. 1972) 258 So.2d 701 (interpretation of Louisiana 'direct action' statute.) None of these cases discloses statutes as broad as that in California or a course of interpretation similar to that here. Nor do they reveal the sort of independent parallelism between their local law and New York law like that between California and New York."

Since our garnishment law does now provide for prejudgment garnishment when the garnishee and the debtor are parties to a contract of insurance, the foregoing statement adds much weight to the determination by Judge Neville.

A further issue was raised in the arguments before this Court. Such issue arose by reason of language in Rule 4.04 of the Rules of Civil Procedure for the District Courts, which provides:

"When quasi in rem jurisdiction has been obtained, a party defending such acts thereby submits personally to the jurisdiction of the court . . ."

The problem is, of course, that if the defendant does not come to the State of Minnesota to defend the action he is not cooperating with the insurance company and may be determined to have no coverage. If he does come to the state to defend the action, he submits, by reason of the foregoing rule, personally to the jurisdiction of the Court and may be subject to an in personam judgment in an amount over and above the limits of his insurance policy. While this Court feels that the rule would not be effective in this type of situation, it does not have to decide such issue for the reason that the plaintiffs have stipulated that they seek no judgment in an amount larger than that of the policy limits.

D.K.A.

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

[Title omitted in printing]

SUMMONS

THE STATE OF MINNESOTA TO THE ABOVE NAMED DEFENDANT:

You, the above named defendant, are hereby summoned and required to answer the Complaint of the plaintiff in the above-entitled action, a copy of which Complaint is hereto attached and herewith served upon you, and to serve a copy of your Answer thereto upon the subscribers

at their offices at 1010 Midwest Plaza Building, 801 Nicollet Mall, in the City of Minneapolis, County of Hennepin, State of Minnesota, within Twenty (20) days after the service of this Summons upon you, exclusive of the day of such service, and, if you fail to answer the said Complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in said Complaint.

Dated: September 4, 1974.

SCHERMER, SCHWAPPACH, BORKON & RAMSTEAD, LTD.
By /s/ JOHN D. MARIANI
Attorneys for plaintiff
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
333-7155

SUPPLEMENTAL COMPLAINT

Plaintiff, Jeffrey D. Savchuk, for his Supplemental Complaint and cause of action against defendant and garnishee states and alleges:

I.

That on January 13, 1972, defendant so carelessly and negligently operated a motor vehicle on Elkhart County Road No. 6 in Indiana as to cause the same to be involved in an accident, thereby causing plaintiff, who was there and then a passenger in said automobile, to maintain the injuries and damages hereinafter described.

II.

That as a direct and proximate result of the negligent and careless conduct of the defendant, as above described, plaintiff sustained bodily injuries, some of which may be permanent; was caused to incur medical expense to treat such injuries, and may be required to incur such expenses in the future; was caused to become disabled and may have sustained a permanent impairment of his ability to work.

III.

That as a result of the foregoing allegations, plaintiff has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

IV.

That State Farm Mutual Automobile Insurance Company is an insurance company duly authorized to do business in the State of Minnesota and does in fact do business in the State of Minnesota.

V.

That said State Farm Mutual Automobile Insurance Company was the carrier of automobile liability insurance for defendant Randal Rush at the time of said accident and is obligated by the terms of its policy of automobile liability insurance to defend lawsuits against said defendant Randal Rush arising out of accidents involving vehicles owned by him and specifically the accident and vehicle involved herein and to indemnify said defendant for damages arising therefrom.

VI.

That pursuant to Minnesota law, on the 29th day of May, 1974, plaintiff caused to be served upon State Farm Mutual Automobile Insurance Company, through the offices of the State of Minnesota Insurance Commissioner, a Garnishment Summons on file herein seeking to attach said obligation under said policy of automobile liability insurance covering defendant herein.

VII.

That on or about July 10, 1974, State Farm Mutual Automobile Insurance Company returned to plaintiff a Garnishment Disclosure on file herein revealing nothing owing.

VIII.

That by reason of said Garnishment Disclosure, and on plaintiff's Motion pusuant to Minnesota Statutes 571.51, the above named Court entered its Order dated August 28, 1974 permitting plaintiff to serve and file this Supplemental Complaint making said State Farm Mutual Automobile Insurance Company a party to the above-entitled action, a copy of which Order is attached hereto, labeled Exhibit "A" and made a part hereof by reference as if set forth in full and detail herein.

WHEREFORE, plaintiff prays for judgment against defendant in the sum of Fifty Thousand ($50,000.00) Dollars, together with his costs and disbursements herein.

Dated this 4th day of September, 1974.

SCHERMER, SCHWAPPACH, BORKON & RAMSTEAD, LTD.
By /s/ JOHN D. MARIANI
Attorneys for plaintiff
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
333-7155

AFFIDAVIT OF SERVICE

STATE OF INDIANA

SS:

ELKHART COUNTY

The undersigned being duly sworn, deposes and says that: he is a duly appointed and acting officer of the Elkhart County Sheriff's Department in and for the County of Elkhart, State of Indiana; and that on September 24, 1974 at 11:10 A.M. he did in the County of Elkhart, State of Indiana, transmit the contents of a Summons and Complaint issued from Hennepin County Fourth Judicial District Court, in cause entitled Jeffrey D. Savchuk vs Randal Rush, Cause # 706126 by leaving a true copy with his father at 1 North South Meadowbrook Lane, and by mailing a true copy to same address.

This officer is over 21 years of age and not interested in this controversy.

/s/ SGT. BOB WILLIAMS

[Jurat omitted in printing]

STATE OF MINNESOTA DISTRICT COURT
County of Hennepin Fourth Judicial District

[Title omitted in printing]

NOTICE OF APPEAL

File No. 706126

TO: PLAINTIFF ABOVE NAMED and RICHARD L. DIAMOND, HIS ATTORNEY

PLEASE TAKE NOTICE that the defendant and garnishee above named appeal to the Supreme Court of the State of Minnesota from the Order dated August 28, 1974 denying the defendant's Motion for dismissal and granting plaintiff's Motion to serve and file a Supplemental Complaint.

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
By /s/ JAMES F. ROEGGE
Attorneys for Defendant and Garnishee
2250 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
338-0661

[Affidavit of service omitted in printing]

STATE OF MINNESOTA
IN SUPREME COURT

NO. 268 (1975)
Hennepin County

45556

JEFFREY D. SAVCHUK,

Respondent,

vs.

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

SHERAN, C. J.
Dissenting, Otis, J.
Endorsed
Filed September 10, 1976
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

1. Minn. St. 571.41, subd. 2, was enacted by the legislature to permit garnishment of an insurer's obligation to an insured, even though not due absolutely and without contingency.

2. Rule 4.04(2), Rules of Civil Procedure, which provides in part, "When quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits per-

sonally to the jurisdiction of the court," applies in cases where jurisdiction is obtained pursuant to § 571.41, subd. 2, only to the extent of the defendant's policy limits.

3. Possible injustice to the defendant in situations where jurisdiction is obtained pursuant to § 571.41, subd. 2, can be controlled by application of the doctrine of forum non conveniens.

Affirmed.

Heard before Sheran, C. J., and Otis, Todd, MacLaughlin, and Scott, JJ., and considered and decided by the court en banc.

OPINION

SHERAN, Chief Justice.

Appeal by defendant, Randal Rush, and garnishee, State Farm Mutual Automobile Insurance Company (State Farm), from an order by the district court granting plaintiff's motion to file and serve a supplemental complaint and denying appellants' motion to dismiss the complaint. We affirm the decision of the trial court for these reasons:

(1) Minn. St. 571.41, subd. 2, was enacted by the legislature to permit garnishment of an insurer's obligation to an insured, even though not due absolutely and without contingency.

(2) Rule 4.04(2), Rules of Civil Procedure, which provides in part, "When quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," applies in cases where jurisdiction is obtained pursuant to §571.41, subd. 2, only to the extent of the defendant's policy limits.

(3) Possible injustice to the defendant in situations

where jurisdiction is obtained pursuant to § 571.41, subd. 2, can be controlled by application of the doctrine of forum non conveniens.

The case arose out of a single-car accident which occurred January 13, 1972, in Elkhart, Indiana. The accident involved a car driven by Rush and owned by his father, in which Jeffrey D. Savchuk was passenger. The Rush car was insured by State Farm. Rush and Savchuk were both residents of Indiana at the time of the accident. Savchuk, a senior in high school when the accident occurred, moved to Minnesota with his parents in June 1973 and is now an employed and married resident of this state.

The instant action was commenced May 28, 1974, when Savchuk served a garnishment summons on State Farm. Service was made by delivery of a copy of the summons to the commissioner of insurance for the state of Minnesota, pursuant to Minn. St. 60A.19. A copy of the garnishment summons, along with copies of the summons and complaint, was also served personally on Rush in Indiana. The complaint alleged negligence and sought $125,000 in damages.

In response to the garnishment summons, State Farm disclosed pursuant to § 571.49 that nothing was due and owing Rush as judgment debtor, Savchuk then moved the trial court for permission to file a supplemental complaint making the garnishee, State Farm, a party to the action pursuant to § 571.51. Rush and State Farm responded by moving for dismissal on the following grounds: Lack of subject-matter jurisdiction, lack of jurisdiction over the defendant, insufficiency of process, and insufficiency of service of process. Since the jurisdictional challenge raised by the motion to dismiss also raised a question as to the constitutionality of the application on these facts of

§ 571.41, the attorney general was invited to intervene. That invitation was declined. The respective motions were then heard by the court. His order granting Savchuk's motion for leave to file a supplemental complaint and denying the motion of Rush and State Farm to dismiss precipitated this appeal.

Two main issues are presented: (1) Is the obligation of an insurance company to defend and indemnify a nonresident insured under an automobile liability insurance policy a garnishable res in Minnesota for the purpose of obtaining quasi-in-rem jurisdiction when the incident giving rise to the action occurs outside Minnesota but the plaintiff in the action is a resident of Minnesota? (2) If the obligation of an insurance company to defend and indemnify its insured is a garnishable res, does it seizure and the resultant quasi-in-rem jurisdiction conform with constitutional requirements of due process?

1. Appellants contend that an insurance company's obligation to defend and indemnify its insured cannot constitute a res garnishable under Minn. St. 571.41, subd. 2. because such an obligation is not "due absolutely, and without depending on any contingency," as required by § 571.43(1).[1] In effect, appellants argue that the prejudgment garnishment sanctioned by subd. 2 of Minn. St. 571.41 can be obtained only when the "due absolutely, and without * * * any contingency" language of § 571.43 (1) is first satisfied.

[1]Minn. St. 571.41, subd. 2, reads in part: "Garnishment shall be permitted before judgment in the following instances only:

"(1) For the purpose of establishing quasi in rem jurisdiction

"(a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or

"(b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or

"(c) the defendant is a nouresident individual, or a foreign corporation, partnership or association."

Minn. St. 571.43(1) reads: "(1) [No person or corporation shall be adjudged a garnishee by reason of:] (1) Any money or other thing due to the judgment debtor, unless at the time of the service of the summons the same is due absolutely, and without depending on any contingency."

It seems to us that the intent of the legislature in enacting § 571.41, subd. 2, was to specify a limited number of instances in which garnishment (and quasi-in-rem jurisdiction) would be available before judgment, regardless of whether the debt on which the garnishment was predicated was due absolutely.

Several reasons support this conclusion. First, the language of § 571.41, subd. 2, itself indicates that the test for determining the validity of prejudgment garnishment when the garnishee and debtor are parties to a contract of insurance is not whether the debt is due absolutely but rather whether the garnishee "*may* be held to respond" for the claim asserted against the debtor. State Farm's *potential* liability is conceded here, and *potential* liability is all that subd. 2 requires.[2]

Second, § 571.41, subd. 2, is both more recent in origin and more specific in language than § 571.43.[3] Because

[2]In construing a statute less explicit than the one here in question, the court in Turner v. Evers, 31 Cal. App. Supp. 3d 11, 18, 107 Cal. Rptr. 390, 395 (1973), stated: "* * * We disagree with the proposition that the 'obligation to indemnify requires a valid in personam judgment against the insured,' and hold the obligation to indemnify requires only the *possibility* of a valid judgment either against the insured personally or depriving him of his property." (Italics supplied.)

See, also, Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973).

[3]Section 571.43 has remained substantially unchanged since 1957; subd. 2 of § 571.41 was added in 1969. Subd. 2 refers specifically to insurance contracts and seems to contemplate precisely the situation presented here. The fact that § 571.43 speaks of "judgment debtor," while § 571.41, subd. 2, applies in a prejudgment context also suggests a reason for being guided by the latter provision. Note, however, that § 571.41, subd. 3, does indicate that § 571.41, subd. 2, parties are properly to be referred to as judgment debtor and judgment creditor, even though no judgment has yet been obtained.

we perceive an irreconcilable conflict between these two statutory provisions, § 571.41, subd. 2, controls.[4] Minn. St. 645.26.

Third, our interpretation of § 571.41, subd. 2, as permitting prejudgment garnishment and the establishment of quasi-in-rem jurisdiction in the circumstances here presented is consistent with two often-stated positions of this court—namely, our interest in providing a forum to residents of this state and our determination in long-arm cases to extend the jurisdiction of our courts to the maximum limits consistent with due process.[5]

We therefore hold that under § 571.41, subd. 2, an automobile insurance company's obligation to defend and indemnify its insured is a res subject to prejudgment garnishment for the purpose of obtaining quasi-in-rem jurisdiction when the incident giving rise to the action occurs outside the state of Minnesota but the plaintiff in the action is a resident of Minnesota.

2. The test for determining the constitutionality of the prejudgment garnishment procedure authorized by Minn. St. 571.41, subd. 2, is threefold: (1) Proper notice must be given to the defendant-insured, affording him adequate opportunity to defend his property; (2) the defendant can-

[4]See, Comment, 1 Wm. Mitchell L. Rev. 161, 176, for an analysis of the statute which reconciles the insurance provision of § 571.41 with the contingency provisions of § 571.43. Our view of the two enactments as irreconcilably in conflict was the view taken by the late Judge Philip Neville in Rintala v. Shoemaker, *supra*.

[5]See, B & J Mfg. Co. v. Solar Industries, Inc., 483 F. 2d 594 (8 Cir. 1973) (applying Minnesota law); State ex rel. Nelson v. Nelson, 298 Minn. 438, 216 N.W. 2d 140 (1974); Franklin Mfg. Co. v. Union Pacific R. Co., 297 Minn. 181, 210 NW. 2d 227 (1973); Mid-Continent Freight Lines, Inc. v. Highway Trailer Industries, Inc., 291 Minn. 251, 190 N.W. 2d 670 (1971); Hunt v. Nevada State Bank, 285 Minn. 77, 172 N.W. 2d 292 (1969), certiorari denied sub. nom. Burke v. Hunt, 397 U.S. 1010, 90 S. Ct. 1239, 25 L. ed. 2d 423 (1970).

not be exposed to liability greater than the amount of his insurance policy; (3) the procedure may be utilized only by residents of the forum state. Minichiello v. Rosenberg, 410 F. 2d 106, 117 (2 Cir. 1968, 1969); Rintala v. Shoemaker, 362 F.Supp. 1044 (D. Minn. 1973).

Plaintiff was a resident of the state at the time this action was commenced,[6] and proper notice was given.[7] The constitutional issue therefore reduces to a question of defendant's potential liability if the procedure authorized by subd. 2 of § 571.41 is permitted. Appellants argue that Rule. 4.04(2), Rules of Civil Procedure, which states in part that "[w]hen quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," means that a defendant in Rush's position[8] would find himself exposed to potentially unlimited personal liability in an action in which the plaintiff originally could have obtained only quasi-in-rem jurisdiction. Because of Rule 4.04(2), appellants argue, quasi-in-rem jurisdiction, with liability limited to the policy amount, is transformed into personal jurisdiction with potential liability extended beyond the policy limits.

If appellants correctly state the effect of Rule 4.04(2) in these circumstances, it is obvious that due process would

[6]Application of Minn. St. 571.41, subd. 2, must be limited to plaintiffs who are residents of the forum state, since without this connection the state would lack sufficient meaningful contact with the suit to justify the exercise of jurisdiction. Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2 Cir. 1969).

[7]Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. ed. 865 (1950), established the notice requirement.

[8]Most automobile insurance policies, including, apparently, the one here, contain a clause which requires the insured to cooperate with the insurer in the defense of any claim. If the insured fails to cooperate, the insurer need not indemnify. The practical effect of the clause means that defendants like Rush must defend in Minnesota or risk losing the right to be indemnified. Ritnala v. Shoemaker, 362 F. Supp. 1044, 1054; Comment, 1 Wm. Mitchell L. Rev. 161, 180.

be violated. Rintala v. Shoemaker, 362 F. Supp. 1044, 1054; Podolsky v. Devinney, 281 F. Supp. 488 (S. D. N. Y. 1968). The underlying question here, however, is not the *effect* of Rule 4.04(2), but whether in fact the rule applies to a case of this kind.

New York was the first state to permit a procedure for obtaining jurisdiction similar to the procedure invoked here. Seider v. Roth, 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966). New York also had a rule similar to Rule 4.04 (2), but when the issue of the rule's applicability was raised, the New York Court of Appeals simply held that it did not apply in Seider-type cases. Simpson v. Loehmann, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319 (1968) (per curiam opinion denying reargument). Thus, in New York, even though the defendant proceeds with the defense on the merits, he does not become personally exposed. New Hampshire has reached a similar conclusion. Forbes v. Boynton, 113 N.H. 617, 313 A. 2d 129 (1973). Today we do likewise.

Basic considerations of fairness underlie our decision. The United States Supreme Court has indicated that a defendant must act to purposefully avail himself of the privilege of conducting activities in the forum state before personal jurisdiction over him may be properly asserted. Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. ed. 2d 1283 (1958). Defendant Rush had engaged in no such voluntary activity; personal jurisdiction over him could not be justified. Plaintiff's reduction of his claim to $50,000, the policy limits, is an implicit recognition of this fact.

But to say that *personal* jurisdiction would not be justified, and to hold, as we do, that Rule 4.04(2) has no application in cases where jurisdiction is obtained pursuant

to Minn. St. 571.41, subd. 2, is not to say that *no* jurisdiction over the defendant can be maintained. On the contrary, considerations of fairness suggest the need for quasi-in-rem jurisdiction obtainable via a prejudgment garnishment procedure like that permitted by § 571.41, subd. 2. In cases of this kind, the insurer controls the defense of the case. Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. W. 2d 669 (1967). Minimum contacts sufficient to provide a constitutional basis for the attachment and quasi-in-rem (as distinguished from personal) jurisdiction can be found in the fact that the insurer is present in the state, registered to do business and doing business here, and in the state's legitimate interest in protecting its residents and providing them with a forum in which to litigate their clams.[9] Rintala v. Shoemaker, 362 F. Supp. 1044, 1057; Forbes v. Boynton, 113 N.H. 617, 623, 313 A. 2d 129, 132.

We therefore hold that due process is not violated when jurisdiction is obtained pursuant to § 571.41, subd. 2, provided that (1) proper notice is given to the defendant insured, adequate to give him opportunity to defend his property; (2) that the defendant-insured's liability is limited to the applicable policy limits of his insurance contract; and (3) that the plaintiff in the action is a resident of the state at the time the action is commenced.

3. Appellants' argument that the procedure authorized by § 571.41, subd. 2, constitutes a direct action against

[9]If a forum is not provided, and the plaintiff is thus denied an opportunity to recover, the state may wind up as the "insurer," paying through its welfare and social assistance programs for the care of an individual injured by the insured. As was stated in Rintala v. Shoemaker, 362 F. Supp. 1044, 1052, the plaintiff in this case is a Minnesota resident, and "[i]t is this state which must protect and care for the plaintiff in the event of indigency [and] this state's services which plaintiff uses."

the insurer was not raised below. The defendant, not the insurer, is the party sued. There is nothing in the statute which suggests that the insurer should be named as a defendant. Rintala v. Shoemaker, 362 F. Supp. 1044, 1951.

We recognize that other states have rejected the procedure we approve.[10] We further recognize that some critics view Seider-type jurisdiction as a solution which creates more problems than it solves.[11] We limit our discussion of these problems to the following observations:

The potential hardship on defendants who may be required to come long distances to defend claims legitimately brought by Minnesota plaintiffs is reduced by the availability of convenient transportation and by the fact that in many cases the defendant's testimony can be obtained by deposition. Where this is not possible, the hardship and expense of travel will ordinarily be no greater for the defendant than it would be for the injured party should jurisdiction be refused.

[10]Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970); Howard v. Allen, 254 S. Ct. 455, 176 S.E. 2d 127 (1970); State ex rel. Government Employees Ins. Co. v. Lasky, 454 S.W. 2d 942 (Mo. App. 1970); Housley v. Aanconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967); Tessier v. State Farm Mutual Ins. Co., 458 F. 2d 1299 (1 Cir. 1972) (interpreting Massachusetts law); Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 2d 1387 (Okla. 1972); De Rentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969); Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975) (interpreting Connecticut law); Robinson v. O. F. Shearer & Sons, Inc., 429 F. 2d 83 (3 Cir. 1970) (interpreting Federal maritime and Pennsylvania law).

[11]The most persistent and prolific is Professor David D. Siegel, who, since 1966, has written on Seider in annual supplementary commentaries to N.Y. Civ. Prac. § 5201 (McKinney Supp. 1975). Other critical commentary has appeared in Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 Col. L. Rev. 660; Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N. Y. U. L. Rev. 1075; Note, 8 B. C. Ind. & Com. L. Rev. 147; Comment, 16 Buffalo L. Rev. 769; Comment, 67 Col. L. Rev. 550; Note, 71 Dickinson L. Rev. 653; Note, 65 Nw. U. L. Rev. 407; Note, 43 St. John's L. Rev. 58; Comment, 11 San Diego L. Rev. 504; Note, 19 Stanford L. Rev. 654; Comment, 5 Sw. U. L. Rev. 417; Comment, 1 Wm. Mitchell L. Rev. 161.

A quasi-in-rem judgment against the defendant would apparently not work an estoppel against the defendant if the plaintiff attempts to sue again outside the state of Minnesota to recover amounts beyond the policy limits. Minichiello v. Rosenberg, 410 F.2d 106, 112; Note, 65 Harv. L. Rev. 818, 834. Any hardship to the defendant arising out of a potential second suit against him is no more than has always existed in quasi-in-rem actions. Often, as here, a second suit will be impossible because the statute of limitations has run in the only available alternate forum. Ordinarily, a second suit against a remote defendant whose liability insurance has been exhausted would seem unlikely.

Finally, and most significantly, if jurisdiction is technically proper under § 571.41, subd. 2, but it nonetheless involves inconvenience for the defendant which outweighs the plaintiff's interest in a Minnesota forum and other relevant factors, then the trial court in its discretion can always grant a motion to dismiss on the grounds of forum non conveniens. Willoughby v. Hawkeye-Security Ins. Co. 291 Minn. 509, 189 N. W. 2d 165 (1971). In considering such a motion to dismiss, the trial judge would be justified in conditioning his ruling upon the willingness of the plaintiff to satisfy his claims against the defendant upon exhaustion of the policy limits.[12]

For the reasons stated, we conclude that it was not unfair on these facts to require defendant and State Farm to defend this action in Minnesota, and the decision of the trial court is therefore affirmed.

Affirmed.

OTIS, Justice (dissenting).

[12]Imposition of such a condition would be consistent with the policy expressed in Rintala v. Shoemaker, *supra*, and consistent with our view that this type of jurisdiction should be limited so as to make its exercise fair to both the insurer and the insured.

This is a case wherein two residents of Indiana were involved in an automobile accident in Indiana. One of the drivers (Rush) had purchased an automobile liability policy from State Farm Mutual Automobile Insurance Company. A year and a half after the accident the other Indiana resident (Savchuk) left that state and moved to Minnesota, whereupon he commenced this lawsuit against Rush for injuries suffered in the accident. As Minnesota court could not constitutionally assert personal jurisdiction over Rush, Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. 2d. 2d 1283 (1958),[1] Savchuk sought to acquire quasi-in-rem jurisdiction.[2] However, Rush has no property in Minnesota. Consequently, Savchuk served a garnishment summons upon State Farm in an attempt to garnish any debt due and owing Rush by State Farm. In support of his action, Savchuk relies upon Minn. St. 571.41, subd. 2, relevant portions of which read:

> "Subd. 2. Garnishment shall be permitted before judgment in the following instances only:
>
> "(1) For the purpose of establishing quasi in rem jurisdiction.
>
> * * * * *
>
> "(c) the defendant is a nonresident individual, or a foreign corporation, partnership or association.
>
> "(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

[1]Rush did not commit any "act by which [he] purposefully avail[ed] himself of the privilege of conducting activities within [Minnesota], thus invoking the benefits and protections of [our] laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. ed. 2d 1283, 1298 (1958).

[2]See, Pennoyer v. Neff, 95 U.S. 714, 24 L. ed. 565 (1877).

It is not disputed that Rush is a nonresident individual; thus, subd. 2(1)(c) is satisfied and this case is a proper case for the exercise of quasi in rem jurisdiction.[3] It is also not disputed that State Farm and Rush are parties to a contract of insurance within the meaning of subd. 2(2). The question is whether, and to what extent, any obligation owed by State Farm can provide a means by which Savchuk can obtain quasi-in-rem jurisdiction over Rush.

Quasi-in-rem jurisdiction over a nonresident by the service of a garnishment summons on the defendant's nationwide insurer is a creature of Seider v. Roth, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99, 216 N.E. 2d 312 (1966). As the majority notes, the Seider procedure has been held improper as a matter of Federal maritime law[4] as well as of the law of almost all the states which have considered it.[5] Only an inferior court in one other state has adopted

[3]Subd. 2(1) is merely procedural, defining the types of defendants over which the exercise of quasi-in-rem jurisdiction is proper. Thus, a court must assert personal jurisdiction over a resident defendant who can be found within the state, and cannot proceed quasi in rem. Of course, subd. 2(1) does not say that quasi-in-rem jurisdiction can be asserted over defendant there listed in all cases, for an additional element is needed—something to garnish, i.e., property located within this state. "If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate." Pennoyer v. Neff, 95 U.S. 714, 723, 24 L. ed. 565, 569.

[4]Robinson v. O. F. Shearer & Sons, Inc., 429 F. 2d 83 (3 Cir. 1970).

[5]Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972); State ex rel. Government Employees Ins. Co. v. Lasky, 454 S.W. 2d 942 (Mo. App. 1970); Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 1387 (Okla. 1972); Jardine v. Donnelly, 413 Pa. 474, 198 A. 2d 513 (1964); De Rentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969); Howard v. Allen, 254 S. C. 455, 176 S. E. 2d 127 (1970); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967). See, also, Tessier v. State Farm Mutual Ins. Co., 458 F. 2d 1299 (1 Cir. 1972); Kirchman v. Mikula, 443 F. 2d 816 (5 Cir. 1971); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975); Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970).

it.[6] Commentary has been highly critical.[7] Even in the state of its birth, the procedure remains only because of the opinion of Judge Charles D. Breitel, in which Judge Bergan concurred, in Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N.E. 2d 669 (1967), the case which reaffirmed Seider. Judge Breitel, appointed to the New York Court of Appeals after Seider, and replacing one of the judges who was in the 4-3 majority in that case, and Judge Bergan, who had dissented in Seider, cast the deciding votes in Simpson for the following reasons:

> "* * * Only a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of that precedent. Yet the theoretical unsoundness of the *Seider* case and the undesirable practical consequences of its rule require some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation.
>
> "It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy.
>
> * * * * *
>
> "Accordingly, I concur to affirm but only because the institutional stability of a court is more important than any single tolerable error which I may believe it has committed." 21 N. Y. 2d 314, 287 N. Y. S. 2d 640, 234 N.E. 2d 674.

Some of the undesirable practical consequences have already arisen. Thus, New Hampshire has adopted the rule

[6]Turner v. Evers, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973). The decision cited in the majority opinion, Forbes v. Boynton, 113 N.H. 617, 313 A.2d 129 (1973), is discussed *infra*.

[7]See footnote 11 in the majority opinion.

that if the nonresident defendant lives in a state which has adopted Seider—i.e., New York—then that defendant's insurer can be garnished in New Hampshire if the insurer does business there. Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973).[8] On the other hand, if the defendant lives in a state which has rejected Seider—e.g. Connecticut—then his insurer cannot be garnished. Robitaille v. Orciuch 382 F. Supp. 977 (D. N. H. 1974). In Vaage v. Lewis, 29 App. Div. 2d 315, 288 N. Y. S. 2d 521 (1968), New York was presented with a case in which a Norwegian resident attempted to garnish in New York the insurer of a North Carolina defendant with respect to an accident which took place in North Carolina. It was held that allowing garnishment in that case would violate the principles of forum non conveniens and due process.[9] In light of the fact that most of our sister states which have considered Seider have rejected it, that the commentary is uniformly critical, that a majority of the court which spawned Seider now believes it to be in error, and mindful of its potentially undesirable consequences, I would decline to adopt it in Minnesota. Whether or not it is authorized by § 571.41, subd. 2(2), in my opinion it is unconstitutional as applied to the defendant in this case.

The majority opinion limits the use of the Seider procedure to residents of Minnesota. This is probably constitu-

[8]In Forbes the New Hampshire Supreme Court stated: "We are not holding that the *Seider* rule is to be applied generally to all cases of foreign motorists insured by a company with an office in this State and licensed to do business in New Hampshire. We are merely holding that under the circumstances of this case in a suit by a resident of New Hampshire against a resident of New York where the *Seider* rule prevails the trial court properly denied the defendant's motion to dismiss plaintiff's action." 113 N. H. 624, 313 A. 2d 133.

[9]See, also, Nationwide Mutual Ins. Co. v. Vaage, 265 F. Supp. 556 (S. D. N. Y. 1967).

tionally required.[10] As Judge Earl Larson said in Adkins v. Northfield Foundry & Machine Co., 393 F. Supp. 1079, 1081 (D. Minn. 1974):

> "One of the principal reasons to limit *Seider* type jurisdictions is that without such limitations, blatant forum shopping would be possible. * * * Further, this limitation is required to give the forum State a recognizable and protectable interest and to prevent an unfair burden that might be placed upon both the nonresident defendant and its insurance company."

In Rintala v. Shoemaker, 362 F. Supp. 1044, 1956 (D. Minn. 1973), the late Judge Philip Neville expressed the reasons behind this limitation:

> "The fear is that unless this limit is placed on *Seider* type jurisdiction blatant forum shopping would be possible since many insurance companies, including Aetna, do business in all fifty states. Further, the essential connection between the forum state and the accident at all, the connection which provides the forum state with a recognizable and protectable interest, is that the forum is the residence of the plaintiff. This limit on *Seider* jurisdiction is not only reasonable but it limits any inconvenience which the insurance company might suffer. The only additional state in which garnishment might be had is the resident of the plaintiff. * * *

[10]Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2 Cir. 1969), affirming 295 F. Supp. 228 (S. D. N. Y 1968); Vaage v. Lewis, 29 App. Div. 2d 315, 288 N. Y. S. 2d 521 (1968); Varady v. Margolis, 303 F. Supp. 23 (S. D. N. Y. 1968); Public Admr. of County of New York v. Unimar Shipping Co., Ltd., 401 F. Supp. 313 (S. D. N. Y 1975); Rintala v. Shoemaker, 362 F Supp. 1044 (D. Minn. 1973); Adkins v. Northfield Foundry & Machine Co., 393 Supp. 1079 (D. Minn. 1974).

> "* * * On the facts of this case Aetna is simply exposed to an action in one more jurisdiction than it would be otherwise. This certainly is no intolerable burden on it or a similarly situated garnishee."

In the case at bar, plaintiff and defendant were both residents of Indiana when this accident occurred.[11] At that time, under the limitation on Seider, Rush and State Farm were amenable to suit in only one jurisdiction—Indiana. If Savchuk had been a Minnesota resident at that time suit could have been brought in only two states—Indiana and Minnesota. However, if jurisdiction is permissible in this case Rush and State Farm are amenable to suit in all 50 states.

If a motorist in another state drives negligently and injures a Minnesotan, a strong case can be made that this state's interests are sufficiently great to allow our courts to use the Seider procedure for obtaining jurisdiction over the case. As Judge Neville put it, such a motorist "is simply exposed to an action in one more jurisdiction that [he] would be otherwise." 362 F. Supp. 1056. However, allowing a potential plaintiff to move to this state after his cause of action has arisen and to invoke Seider to bring the case to Minnesota means that a plaintiff has a choice of 50 jurisdictions in which to sue. Such a result in my opinion violates due process.[12] Rush did not injure one who was a Minnesota resident on the day of the accident. He should not be forced to defend himself in a Minnesota court.

[11]Plaintiffs statement of the case indicates that all of the witnesses and records, as well as a treating physician, are located in Indiana, except for plaintiff's family and two Minnesota physicians who, presumably, treated him after he moved to Minnesota.

[12]In the only reported case where this issue was presented, Robitaille v. Orciuch, 382 F Supp. 977 (D. N. H. 1974), jurisdiction was denied on other grounds. See this discussion of Robitaille and Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973), *supra.*

Under the policies of Schwartz v. Consolidated Freightways Corp., 300 Minn. 487, 491, 221 N. W. 2d 665, 668 (1974)—advancement of Minnesota's governmental interests and application of the better rule of law—Minnesota's comparative negligence law, and not Indiana's contributory negligence law, will apply. Thus, if Rush injures another Indiana resident in Indiana, and that person is able to establish residence in a new jurisdiction, he may use Seider to bring the defendant in and defend, and avoid Indiana's contributory negligence law. Under the majority opinion, if my next-door neighbor is negligently injured on my property he is free to move to any other state where my homeowners insurer transacts business and force me to defend there.

The majority opinion's answer is that the defendant is free to move to dismiss on grounds of forum non conveniens. However, that presupposes jurisdiction, which I cannot accept.[13]

Accordingly, I would reverse and hold that Minn. St. 571.41, subd. 2(2), is unconstitutional as applied to this case. It would not then be necessary to reach the issue of whether Seider is to become the rule of this state.

---

[13] "The district courts of this state may fairly exercise their discretion in declining to accept jurisdiction of transitory causes of acion brought here by citizens or noncitizens of this state who are nonresident when it fairly appears that it would be more equitable that the cause of action be tried in some other available court of competent jurisdiction." Johnson v. Chicago B. & Q. R. Co., 243 Minn. 58, 79, 66 N.W. 2d 763, 776 (1954).

STATE OF MINNESOTA
IN SUPREME COURT

JEFFREY D. SAVCHUK,

Respondent,

vs.

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

45556

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellants herein the sum and amount of Three Hundred Twenty-Five and 99/100 DOLLARS, ($325.99) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed September 27, 1976.

BY THE COURT:
Attest: JOHN McCARTHY
Clerk

STATE OF MINNESOTA
IN SUPREME COURT

[Title omitted in printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendant Randal Rush and the garnishee State Farm Mutual Automobile Insurance Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Minnesota affirming the previous order of the Hennepin County District Court for the State of Minnesota conferring jurisdiction of the Minnesota courts herein and which judgment was entered by the Supreme Court of the State of Minnesota in this action on September 27, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2) and, alternately, 28 U.S.C. §2103.

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
By /s/ O. C. ADAMSON II
By /s/ JAMES F. ROEGGE
2250 IDS Center
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Minneapolis, Minnesota 55402
Telephone: (612) 338-0661
Attorneys for Appellants

[Affidavit of service omitted in printing]

UNITED STATES OF AMERICA, SS:
THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the Supreme Court of the State of Minnesota,

GREETINGS:

WHEREAS, lately in the Supreme Court of the State of Minnesota, there came before you a cause between Jeffrey D. Savchuk, respondent, and Randal Rush and State Farm Mutual Automobile Insurance Company, garnishee, appellants, No. 45556, wherein the judgment of the said Supreme Court was duly entered on the twenty-seventh day of September A. D. 1976, as appears by an inspection of the jurisdictional statement from the Supreme Court of Minnesota and motion to dismiss or affirm.

AND WHEREAS in the 1976 Term, the said cause having been submitted to the SUPREME COURT OF THE UNITED STATES on the said jurisdictional statement and motion to dismiss or affirm:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 27, 1977, by this Court that the judgment of the Supreme Court of Minnesota in this cause be vacated, and that this cause be remanded to the Supreme Court of the State of Minnesota for further consideration in light of Shaffer v. Heitner, 433 U.S. — (1977).

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice and the Constitution and laws of the United States. the said appeal notwithstanding.

Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-ninth day of July in the year of our Lord one thousand nine hundred and seventy-seven.

MICHAEL RODAK, JR.
Clerk of the Supreme Court of the
United States
By /s/ FRANCES J. LARSON
Deputy Clerk

STATE OF MINNESOTA
IN SUPREME COURT

No. 268 (1975)
Hennepin County
45556

Jeffrey D. Savchuk,

Respondent,

vs.

Randal Rush and State Farm Mutual Automobile Insurance Company, garnishee,

Appellants.

Wahl, J. Dissenting. Otis, Rogosheske, and Peterson, JJ.
Endorsed

Filed October 20, 1978, John McCarthy, Clerk Minnesota Supreme Court

SYLLABUS

The assertion of quasi-in-rem jurisdiction through garnishment of an insurer's obligation to an insured, pursuant to Minn. St. 571.41, subd. 2, as limited by Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624 (1976), is consistent with the due process standards of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. ed. 2d 683 (1977).

Affirmed.

Considered and decided by the court en banc.

OPINION

WAHL, Justice.

On remand from the United States Supreme Court for further consideration in light of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. ed. 2d 683 (1977). For the reasons below, we distinguish Shaffer v. Heitner, *supra,* and hold that the assertion of jurisdiction pursuant to Minn. St. 571.41, subd. 2, as limited by our earlier decision in Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624 (1976), vacated and remanded, 433 U.S. 902, 97 S. Ct. 2964, 53 L. ed. 2d 1086 (1977), is consistent with the standards established by International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. ed. 2d 95 (1945), and its progeny.

The facts are as stated in the earlier decision. Plaintiff, Jeffrey Savchuk, was injured in a single-car accident in Elkhart, Indiana, on January 13, 1973. At the time of the accident, both Savchuk, a senior in high school, and the driver of the car, defendant Randal Rush, were Indiana residents. In June 1973, Savchuk moved with his parents to Minnesota, where he became employed, was married and continues to reside. The personal injury action was commenced in district court, Hennepin County, on May 28, 1974. Savchuk served a garnishment summons on garnishee State Farm Insurance pursuant to Minn. St. 571.41, subd. 2[1] and Minn. St. 60A.19, subd. 1(3). Defendant Rush,

[1]Minn. St. 571.41, subd. 2, states: Notwithstanding anything to the contrary herein contained, a plaintiff in any action in a court of record for the recovery of money may issue a garnishee summons before judgment therein in the following instances only:

* * * * *

(b) If the court shall order the issuance of such summons, if a summons and complaint is filed with the appropriate court and either served on the defendant or delivered to a sheriff for service on the

still an Indiana resident, was personally served with a copy of the garnishment summons and copies of the summons and personal injury complaint.

By order, the district court denied the motion of Rush and State Farm to dismiss for lack of jurisdiction and insufficient process. They appealed to this court and the order was affirmed. Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624 (1976).

Upholding the constitutionality of Minnesota's garnishment provision. Minn. St. 571.41, subd. 2, this court found that procedure "consistent with two often-stated positions of this court—namely, our interest in providing a forum to residents of this state and our determination in long-arm cases to extend the jurisdiction of our courts to the maximum limits consistent with due process." 245 N.W. 2d 628. The statute was interpreted to satisfy three due process requirements: the provision of adequate notice to defendant-insured; a limitation of liability to insurance policy amounts; and restriction of use to plaintiffs who reside in the forum state, 245 N.W. 2d 628.

On June 24, 1977, the United States Supreme Court vacated that judgment and remanded the case for further

defendant not more than 30 days after the order is signed, and if, upon application to the court it shall appear that:

* * * * *

(2) The purpose of the garnishment is to establish quasi in rem jurisdiction and that

* * * * *

(b) defendant is a nonresident individual, or a foreign corporation, partnership or association.

(3) The garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.

(4) The creditor has been unable to serve upon the debtor the summons and complaint in the main action because the debtor has been inaccessible due to residence and employment in buildings where access is restricted.

consideration in light of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. ed. 2d 683 (1977), which requires, in particular, that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe Co. and its progeny" 97 S. Ct. 2584-85.

The issue now before this court is whether Minnesota's assertion of jurisdiction over out-of-state defendants pursuant to Minn St. 571.41, subd. 2, as limited by this court in Savchuk, *supra,* satisfies the due process standards set forth in International Shoe Co. and Shaffer.

In Shaffer, *supra,* a nonresident plaintiff filed a shareholder's derivative suit in Delaware state court, naming as defendants Greyhound (a Delaware corporation), Greyhound Lines (its wholly-owned subsidiary incorporated in California), and 28 present or former officers or directors of one or both of the corporations, none of the last being Delaware residents. The complaint alleged that the individual defendants had violated their duties to the corporation and its subsidiary by permitting activities in Oregon which made the company liable for substantial antitrust litigation, damages, and criminal contempt fines. The Delaware court obtained jurisdiction by sequestering, via stop-transfer orders. Greyhound stock owned by the individual-defendants.[2]

On appeal to the Delaware Supreme Court, one constitu-

[2]8 Del. Code Ann. § 169 makes Delaware the situs of ownership of stock in Delaware corporations; the rule in the other 49 states places that situs in the state of the owner's residence. 97 S. Ct. 2588 (Stevens, concurring).

Sequestration is a seizure of property used to compel the personal appearance of the nonresident defendant. See, 10 Del. Code Ann. § 366. Although liability is limited to the value of the property seized, potenial liability here was $1.2 Million. 97 S. Ct. 2574 n 7.

tional challenge to the jurisdiction-by-sequestration procedure was side-stepped:

> "There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. * * * The reason, of course, is that jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum * * *." Greyhound Corporation v. Heitner, 361 A. 2d 225 (Del. 1976), reversed sub nom, Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569.

The United States Supreme Court overruled this categorical in rem/in personam jurisdiction analysis:

> "* * * in order to justify an exercise of jurisdiction *in rem,* the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in International Shoe [Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. ed. 2d 95 (1945)]. 433 U.S. 207, 97 S.Ct. 2582, 53 L. ed. 2d 699.
>
> "* * * For in cases such as Harris [v Balk, 198 U.S. 215 (1905)] and this one, the only role played by the property is to provide the basis for bringing the defendant into court. Indeed, the express purpose of the Delaware sequestration procedure is to compel the defendant to enter a personal appearance. In

such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction would be equally impermissible." 433 U. S. 209, 97 S. Ct. 2583, 53 L. ed. 2d 701.

Evaluating the sequestration procedure by that standard, the court held Delaware's assertion of jurisdiction to be inconsistent with the due process "minimum contacts" limitation on state power. It found the asserted state interest in supervising the management of local operations to be imperfectly served by the sequestration procedure, which is not expressly limited to corporate fiduciaries and does not even guarantee jurisdiction over all such figures.[3] 433 U.S. 214, 97 S. Ct. 2585-86, 53 L. ed. 2d 704. Though such an interest might support the application of Delaware law to the controversy, choice of law does not necessarily establish jurisdiction over the parties, 433 U.S. 215, 97 S. Ct. 2586, 53 L. ed. 2d 704. Accordingly, judgment was reversed.

Shaffer generally directs the application of Internation-Shoe Co. standards to all assertions of state court jurisdiction, 433 U.S. 212, 97 S. Ct. 2584, 53 L. ed. 2d 703, but the necessary consequences for jurisdiction under Minn. St. 571.41, subd. 2, are not clear. That statute embodies the rule of Seider v. Roth, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99, 216 N. E. 2d 312 (1966). It provides jurisdiction over a nonresident defendant via garnishment of a contractual obligation, the obligation of the insurance company (doing business in this state) to defend and in-

[3]Heitner failed to secure jurisdiction over seven of the individual defendants since Delaware law does not require directors to own stock. 8 Del. C. § 141 (b).

demnify the nonresident, insured defendant. Under the statute, as interpreted in our earlier opinion, the non-resident defendant is guaranteed notice, his liability is limited to the policy's face amount and he procedure may be utilized only by residents of the forum state. Savchuk v. Rush, *supra*.

Although Seider v. Roth-type jurisdiction is undoubtedly the most highly controversial and significant contemporary application of the doctrine of quasi-in-rem jurisdiction, it does not appear in the historical discussion in Shaffer.[4]

Since Shaffer, New York courts have split over its implications for Seider v. Roth-type jurisdiction. Several trial courts have held such jurisdiction to be precluded by Shaffer: Torres v. Towmotor Division of Caterpillar, Inc. D. C. — F. Supp. — (E.D. N.Y. 1977) (cited in Alford v. McGaw, 402 N.Y.S. 2d 499 (N.Y. App. Div. 1978); Rodriguez v. Wolfe, 401 N.Y.S. 2d 442 (N.Y. Sup. 1978); Attanasio v. Ferre, 401 N.Y.S.2d 685 (N.Y. Sup. 1977); Datz v. Umansky, 399 N.Y.S. 2d 412 (N.Y. Sup. 1977); Kennedy v. Deroker, 398 N.Y.S. 2d 628 (N.Y. Sup. 1977). Other trial courts have held that such jurisdiction does not offend due process: O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994 (E.D.N.Y. 1977), affirmed, 579 F. 2d 194 (2 Cir. 1978); Wallace v. Target Store, Inc., 400 N.Y.S. 2d 478 (N.Y. Sup. 1977). Most recently, a New York ap-

[4]The United States Supreme Court has never considered the constitutionality of the procedure, twice declining to review appellate decisions sustaining the exercise of Seider v. Roth jurisdiction: Minichiello v. Rosenberg, 410 F. 2d 106 (2 Cir. 1968) affirmed on rehearing en banc, 410 F. 2d 117, certiorari denied, 396 U. S. 844, 90 S. Ct. 69, 29 L. ed. 2d 94 (1969), Victor v. Lyon Assoc. Inc., 21 N.Y. 695, 287 N.Y.S. 2d 424, 234 N. E. 2d 459 (1967), appeal dismissed for want of a substantial Federal question, sub nom, Hanover Ins. Co. v. Victor, 393 U. S. 7, 88 S. Ct. 44, 21 L. ed. 94 (1968).

pellate court upheld the exercise of Seider-type jurisdiction in light of Shaffer v. Heitner. Alford v. McGaw, 402 N.Y.S. 2d 499 (N.Y. App. Div. 1978).

This exercise of jurisdiction differs in many important respects from the Delaware sequestration procedure invalidated in Shaffer: First, sequestration did not parallel the asserted state interest in the management of state-chartered corporations—sequestration could be used in *any* suit against a nonresident, and in fact did not guarantee jurisdiction over corporate fiduciaries. By contrast, Minnesota's garnishment procedure specifically premises jurisdiction on attachment of the obligation to respond to claims in the underlying action. Minn. St. 571.41, subd. 2(3). Delaware's interest in supervising its corporations' fiduciaries established only the propriety of Delaware *law*, not necessarily a Delaware *forum*, 433 U.S. 214-15, 97 S. Ct. 2586, 53 L. ed. 2d 704-05. Minnesota's legitimate interest in facilitiating recoveries for resident plaintiffs[5] not only requires provision of a local forum, but may override traditional choice

[5]Cf. Minichiello v. Rosenberg, 410 F. 2d 106 (2 Cir. 1968); McGee v. International Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. ed. 2d 223 (1957); Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927).

A state's interest in providing a forum for its residents is particularly strong where an alternative forum would not have permitted recovery. In the instant case, Indiana's guest statute would have cut off Savchuk's claim. Ind. Stat. § 9-3-3-1. A plaintiff's lack of access to an alternative forum might be a legitimate consideration in justifying exercise of jurisdiction. Shaffer v. Heitner, 433 U. S. 211, 97 S. Ct. 2584, 53 L. ed. 2d 702, n. 37. We also note, in this regard, that by the time the trial court ruled on Savchuk's motion to amend the complaint by making State Farm Mutual a party, the Indiana two-year statute of limitations had run.

One commentator states that a plaintiff's residence "may be deemed an overriding minimum contact" sufficient to justify the exercise of jurisdiction, where no alternative forum exists. Zammit, Quasi-in-Rem Jurisdiction: Outmoded & Unconstitutional? 49 St. John's L. Rev. 668, 682 (1975).

of law analysis. See, Schwartz v. Consolidated Freightways Corp. of Delaware, 300 Minn. 487, 221 N.W. 2d 665 (1974), appeal after remand, 306 Minn. 564, 237 N.W. 2d 385 (1975) (applying Minnesota comparative negligence law where plaintiff was a Minnesota resident, although accident occurred in contributory-negligence state.) The stock sequestered in Delaware was completely unrelated to the plaintiff's cause of action, constituting only an attachable asset used to compel the defendants' personal appearance. 433 U.S. 208-09, 97 S. Ct. 2585, 53 L. ed. 2d 700-01. In the instant case, the insurer's obligation to defend and indemnify, while theoretically separable from the tort action, has *no* independent value or significance apart from accident litigation. In the accident litigation, however, it is inevitably the focus, determining the rights and obligation of the insurer, the insured, and practically speaking, the victim.

More importantly, because this assertion of state court jurisdiction is, as has long been acknowledged, a "hybrid," its jurisdiction does not rest exclusively on Harris v. Balk.[6]

[6]Most recently in O'Connor v. Lee-Hy Paving Corp., 579 F. 2d 194 (2 Cir. 1978), the Second Circuit Court of Appeals by Judge Friendly distinguished Seider from Harris in light of Shaffer.

"What sharply differentiates these cases from those just hypothesized is that a judgment for the plaintiff will not deprive a defendant of anything substantial that would have been otherwise useful to him. He could not recover, sell or hypothecate the covenant to indemnify; its utility is solely to protect him from liability and in an appropriate case to allow the plaintiff to recover from the insurer * * *. What we said in *Minichiello, supra*, nine years ago *apropos of Harris v. Balk* remains just as true today: '* * * *a Seider judgment would mean simply that liability policies, on which appellants could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured.*' 410 F. 2d 118 (emphasis supplied). Moreover, since the insurance policy was purchased to protect against the type of liability which is the subject of the lawsuit and since the obligation to defend clearly encompasses the litigation, *Seider* does not sanction 'the type

This court and other courts have evaluated due process challenges to such an assertion of jurisdiction in terms of minimum contacts and fairness. Savchuk v. Rush, — Minn. —, 245 N.W. 2d 624, 629 (1976); Simpson v. Loehmann, 21 N.Y. 2d 305, 311, 287 N.Y.S. 2d 633, 637, 234 N.E. 2d 669, 672 (1967); Rintala v. Shoemaker, 362 F. Supp. 1044, 1053 (D. Minn. 1973). See, Alford v. McGaw, 402 N. Y. S. 2d 499, 502 (N. Y. App. Div. 1978).

Just as Shaffer compels perforation of the *in rem* fiction as a jurisdictional base, we are obligated to consider the practical relationship between the insurer and the nominal defendant here. The insurer's garnished obligation to respond is complemented by the insured's obligation to cooperate. Our limitation of liability to policy limits protects the named defendant from personal exposure. The result is often labeled a procedural alternative to a direct action statute, a preferred alternative which permits insurer anonymity. See, Alford v. McGaw, 402 N. Y. S. 2d 499, 503 (N. Y. App. Div. 1978); See, also, Mehren & Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis," 79 Harv. L. Rev. 1121, 1168. This label does not obviate the due process scrutiny. Cf., Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 75 S. Ct. 166, 99 L. ed. 74 (1954); it does, however, serve to minimize the

of *quasi in rem* action typified by *Harris v. Balk* and the present case [sequestration of shares in a Delaware corporation]', where the property which 'serves as the basis for * * * jurisdiction is *completely unrelated* to the plaintiff's cause of action,' *Shaffer v. Heitner, supra,* 433 U. S. 208-09, 97 S. Ct. 2582, 53 L. ed. 700-01 (emphasis supplied.) The fall of *Harris v. Balk* therefore does not necessarily topple *Seider,* * * *."

See, also, Smit, "The Enduring Utility of In Rem Rules: A Lasting Legacy of *Pennoyer v. Neff*." 43 Brooklyn L. Rev. 600, 603-24 (1977), cited in Shaffer, 433 U. S. 208, 97 S. Ct. 2582, 53 L. ed. 2d 700, n. 30 and, Jonnet v. Dollar Sav. Bank of New York, 530 F. 2d 1123, 1138-39 (3 Cir. 1976) (Gibbons, J., concurring), cited in Shaffer, 433 U. S. 205, 97 S. Ct. 2581, 53 L. ed. 2d 698.

traditional "jurisdictional bias" in favor of the nominal defendant.

Similarly, limiting the availability of this type of quasi in rem jurisdiction to residents of the forum, Savchuk v. Rush, — Minn. —, 245 N.W. 2d 628 (1976), minimizes the potential for abuse and forum shopping.[7] See, Rintala v. Shoemaker, 362 F. Supp. 1044, 1956 (D. Minn. 1973). Again, we note that the trial court in its discretion can always grant a motion to dismiss on the grounds of forum non-conveniens, should the defendant's burden outweigh the plaintiff's interest in a Minnesota forum and other relevant factors. 245 N.W. 2d 630.

We view as relevant the relationship between the defending parties, the litigation, and the forum state. It cannot be said that Minnesota lacks such minimally-requisite "contacts, ties or relations" to those defending parties as to offend the requirements of due process. In view of our consistent policies of providing a forum to residents of this state and extending our jurisdiction to the maximum limits consistent with due process, we decline to reverse our prior decision.

Accordingly, the order of the district court is affirmed.

OTIS, Justice (dissenting).

The inference to be drawn from this remand is not, in my opinion, that we are free to distinguish Shaffer and reinstate the judgment vacated by the Supreme Court. As I construe it, we are simply afforded an opportunity to revise our decision to conform to Shaffer on the assumption

[7]Although Jeffrey Savchuk was a resident of Indiana at the time of the accident, Savchuk, then 19 years old, accompanied his parents in their move to Minnesota six months later. He has established and continued residency; we find no suggestion of forum-shopping in the record.

we would have reached a different conclusion had Shaffer been decided when we wrote Savchuk. Any other inference would lead to the unlikely conclusion that the Supreme Court was merely delegating to us its responsibility to resolve a difficult constitutional question.

Three specific rules recognized in Shaffer dispose of the jurisdictional issue here presented.

First. A forum state acquires no jurisdiction either in rem or in personam merely by the location in that state of property owned by defendant, unless such property is the subject of the litigation. Otherwise it is available only to satisfy a judgment. 433 U.S. 210-13, 97 S. Ct. 2583-84, 53 L. ed. 2d 701-03.

Second. In order to obtain either in rem or in personam jurisdiction the *defendant* must have certain minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 433 U.S. 203, 97 S. Ct. 2580, 53 L. ed. 2d 697.

Third. It is the relationship among the defendant, the forum, and the litigation which is the basis for jurisdiction over a nonresident, not their relationship with the *plaintiff.* 433 U.S. 208-09, 97 S. Ct. 2582-83, 53 L. ed. 2d 700-01.

1. The majority holds that while the stock sequestered in Shaffer "was completely unrelated to plaintiff's cause of action" the State Farm's obligation to defend and indemnify is "inevitably the focus" in this litigation and determines "the rights and obligations of the insurer, the insured, and practically speaking, the victim." However, this is not the test of jurisdiction. I submit.

Under the explicit holding of Shaffer, whether or not State Farm's contingent liability is a property right is wholly immaterial unless it is the subject matter of the litigation. There is no dispute as to the amount or scope of coverage under the policy. It is no more the subject of the litigation than would be a bank account available in Minnesota to satisfy the judgment. Absent a controversy involving the policy which is justiciable in Minnesota, the mere happenstance of an asset such an insurance being available to satisfy a judgment no longer confers in rem jurisdiction. In other words, the fact defendant is financially responsible in Minnesota is not enough without some other "contacts, ties, or relations" with the state as defined in International Shoe v. Washington.

2. A policy of providing a forum to residents of this state, extending our jurisdiction to the maximum limits consistent with due process is relied on by the majority. This is certainly the legislative intent and one with which I have no quarrel. The problem is that the majority stresses the forum's relationship with the plaintiff, whereas the constitutional test is the contact of the defendant with the forum.

The majority leans on note 37 in Shaffer for the proposition that the unavailability to plaintiff of any other forum is an important factor in acquiring jurisdiction over a nonresident defendant. That note, however, gives no support for such a rule. It merely states "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." 433 U.S. 211, 97 S. Ct. 2584, 53 L. ed. 2d

702, n. 37. Nor can I agree that "Minnesota's legitimate interest in facilitating recoveries for resident plaintiffs not only requires provision of a local forum but may override traditional choice of law analysis." The Schwartz case, cited in reliance for that rule, must be read in the context of Shaffer, now the governing law. No mention is made in Shaffer of the relevance of "minimum contacts" between plaintiff and the forum as modifying the rules set forth in International Shoe.[1]

3. This is an action for personal injuries and not a declaratory judgment suit to construe a liability policy. As in Shaffer the plaintiff did not allege and does not now claim that defendant ever set foot in Minnesota. He does not identify any act related to his cause of action as having taken place in Minnesota. The issue of in personam jurisdiction was extensively discussed in Hanson v. Denckla, 357 U.S. 235, 250-55, 78 S. Ct. 1228, 1238-40, 2 L. ed. 2d 1283, 1296-98 (1958). In that case the United States Supreme Court affirmed the decision of a Delaware court refusing to give full faith and credit to a Florida probate proceeding on the ground the Florida court failed to have jurisdiction over a Delaware trustee holding property which was the subject of the Florida probate proceedings. In affirming the decision of the Delaware court the Supreme Court made these observations:

> "As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714 to the flexible standard of International Shoe Co. v. Washington, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. * * * Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." 357 U.S. 250-51, 78 S. Ct. 1238, 2 L. 3d. 2d 1296.

[1]In Shaffer both the plaintiff and the defendants were nonresidents of the forum.

The court stressed the fact that the trust agreement was executed in Delaware and the settlor was domiciled at that time in Pennsylvania and did not become domiciled in Florida until some years later. The court reached the following conclusion:

> "* * * The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum

State, thus invoking the benefits and protections of its laws." 357 U.S. 253, 78 S. Ct. 1239-40, 2 L. ed. 2d 1298.

* * * * *

"It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a non sequitur." 357 U.S. 254, 78 S. Ct. 1240, 2 L. ed. 2d 1298.

* * * * *

"* * * It does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction." 357 U.S. 254, 78 S. Ct. 1240, 2 L. ed. 2d 1298.

4. When plaintiff was injured, he and defendant were both Indiana residents, driving on an Indiana highway in a car registered in Indiana and insured in Indiana by a policy written in that state. The record discloses no relationship between defendant and the State of Minnesota. The fact that his insurer also does business in Minnesota is not, of course, attributable to any activity on the part of defendant. To paraphrase the words of Mr. Justice Marshall in Shaffer, defendant has simply had nothing to do with the State of Minnesota and had no reason to expect to be haled before a Minnesota court. By acquiring an insurance policy with State Farm he did not surrender his

right to be brought to judgment only in a state with which he had minimum contacts. Mr. Justice Stevens' comments in his concurring opinion apply with equal force to the role of defendants liability insurance in this case:

"One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction.

* * * * * If its procedure were upheld, Delaware would, in effect, impose a duty of inquiry on every purchaser of securities in the national market. For unless the purchaser ascertains both the state of incorporation of the company whose shares he is buying, and also the idiosyncrasies of its law, he may be assuming an unknown risk of litigation." 433 U.S. 218-19, 97 S. Ct. 2587-88, 53 L. 3d. 2d 706-97.

Shaffer reiterates the rule laid down in International Shoe and applies it to in rem jurisdiction:

"Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." 326 U.S. 319, 66 S. Ct. 1160, 90 L. ed. 2d 104.

Defendant himself, it is conceded, has not simply had minimum contacts with Minnesota. He has had no contacts with Minnesota. Under such circumstances it is not

my notion of fair and orderly administration of justice to require a citizen of Indiana, because he carried liability insurance, to come to Minnesota to defend himself against the claims of another Indiana citizen who has had no contact with this state until his parents elected for undisclosed reasons to make Minnesota his residence. As was noted in the prior dissent:

> "Plaintiff's statement of the case indicates that all of the witnesses and records, as well as a treating physician, are located in Indiana, except for plaintiff's family and two Minnesota physicians who, presumably, treated him after he moved to Minnesota." — Minn. —, 245 N.W. 2d 644, 633 n. 11 (1976).

Our long-arm statute is designed essentially to give redress to bona fide citizens of Minnesota who have suffered a wrong by the harmful intrusion of a nonresident into this jurisdiction. It is reasonable to expect nonresidents who do business here or who otherwise enjoy the privileges and protection of our laws to respond in our courts for injury caused citizens of this state by virtue of their activities. However, where, as here, the injury occurred in a foreign state at a time when Minnesota had no connection with either the parties or the cause of action, I fail to see the logic or the beneficial public policy of encouraging after-the-fact forum shopping to secure retroactive jurisdiction in this state.

Accordingly I would reverse.

ROGOSHESKE, Justice (dissenting).

I join in the dissent of Mr. Justice Otis.

PETERSON, Justice (dissenting).

I join in the dissent of Mr. Justice Otis.

STATE OF MINNESOTA, IN SUPREME COURT

JEFFREY D. SAVCHUK,

Respondent.

vs.

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

Pursuant to the Mandate of the U.S. Supreme Court dated July 29, 1977, the judgment of this Court dated and entered on September 27, 1976, be and hereby is vacated. Pursuant to an order of this Court heretofore duly made and entered in this cause on October 20. 1978, it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellants herein the sum and amount of Two Hundred Sixty-Nine and 78/100 DOLLARS, ($269.78) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed November 3, 1978.

BY THE COURT·
Attest: JOHN McCARTHY
Clerk

State of Minnesota
In Supreme Court

[Title omitted in printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that defendant Randal Rush and the garnishee State Farm Mutual Automobile Insurance Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Minnesota Supreme Court, which judgment was entered on November 3, 1978, and which judgment reaffirmed a previous judgment of the Minnesota Supreme Court of September 27, 1976, and which judgment was vacated and remanded by the United States Supreme Court pursuant to the Order of the United States Supreme Court of June 27, 1977.

This appeal is taken pursuant to 28 U. S. C. §1257 (2) and, alternately, 28 U. S. C. §2103.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-952

RANDAL RUSH,
Defendant-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

vs.

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

On Appeal from the Supreme Court of Minnesota

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
Motion to Dismiss or Affirm	1
Statement of Issue	2
Statement of Proceedings	2
Argument:	
The Appeal Presents No Substantial Federal Question Necessitating Further Argument	3
Conclusion	5

TABLE OF AUTHORITIES

Statutes:

Minnesota Statutes:

Minn. Stat. §571.41 2

Rules:

Supreme Court Rules, Rule 16 1

Cases:

Supreme Court Cases:

International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 2d 95 (1945) .3, 4

Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) 2, 3, 4

Federal Court Cases:

Minichiello v. Rosenberg, 410 F. 2d 106 (2nd Cir. 1968) cert. denied, 396 U.S. 844, 90 S. Ct. 69, 24 L. Ed. 2d 94, rehearing denied, 396 U.S. 949, 90 S. Ct. 370, 24 L. Ed. 2d 254 (1969) 4

O'Connor v. Lee-Hy Paving Corp., 579 F. 2d 194 (2nd Cir. 1978) 4

Jeans v. Mitchell, 418 F. Supp. 370 (D. Minn. 1976) 3, 4
Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973) 4

State Court Cases:

Alford v. McGaw, 402 N.Y.S. 2d 499, 503 (N.Y. App. Div. 1978) 4
Seider v. Roth, 17 N.Y. 2d 111, 269 N.Y. 2nd 99, 216 N.E. 2d 312 (1966) 4
Victor v. Lyon Associates Inc., 21 N.Y. 2d 695, 287 N.Y.S. 2d 424, 234 N.E. 2d 459, appeal dismissed for want of a substantial federal question, sub. nom. Hanover Ins. v. Victor, 393 U.S. 7, 89 S. Ct. 44, 21 L. Ed. 2d 385 (1968) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ———

RANDAL RUSH,
Defendant-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

vs.

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

On Appeal from the Supreme Court of Minnesota

APPELLEE'S MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Supreme Court Rules, appellee hereby respectively moves the Court to dismiss the pending appeal in this matter, or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of the State of Minnesota. This motion is brought on the grounds that the appeal presents no substantial or undetermined federal question on which the decision of this appeal depends and thus does not require further argument.

STATEMENT OF ISSUES

Is Minnesota's pre-judgment garnishment procedure pursuant to Minn. Stat. §571.41, as construed and applied by the Minnesota Supreme Court consistent with the due process standards of *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L. ed 2d 683 (1977)?

STATEMENT OF PROCEEDINGS

Appellee, a Minnesota resident for all relevant purposes of this appeal, was injured while a passenger in an automobile driven by defendant-appellant, an Indiana resident, in an accident in Indiana. Defendant was insured for automobile liaiblity purposes by garnishee-appellant which issued the particular policy in Indiana but which conducts a very substantial business in Minnesota. Appellee commenced suit in state court in Minnesota by causing a garnishment summons to be served upon the insurer in Minnesota pursuant to the challenged statute. Upon receipt of a "nothing owing" disclosure, appellee made a showing of probable cause before the Minnesota District Court and the court added garnishee as a party to the action, pending resolution of the suit on its merits. Defendant was personally served in Indiana with notice of the garnishment and the Summons and Complaint.

Appellants moved to dismiss the cause of action, alleging lack of jurisdiction by the Minnesota court over appellants and the subject matter and properly raising the constitutional issue. The trial court denied the motion and on appeal the Minnesota Supreme Court affirmed, both on the basis of state law and on the constitutionality of the procedure. Shortly, thereafter, the Minnesota Federal District

Court in *Jeans v. Mitchell*, 418 F.Supp. 730 (D.Minn. 1976) reaffirmed the constitutionality of the statute challenged herein as constructed and applied.

Appellants appealed to this Court and in an Order dated June 27, 1977 the judgment was vacated and the case remanded to the Minnesota Supreme Court in light of *Shaffer v. Heitner*, 433 U.S. 186 (1977). The Minnesota Supreme Court found the assertion of quasi-in-rem jurisdiction through garnishment of an insurer's obligation to an insured consistent with the due process standards of *Shaffer* and affirmed. This appeal was then taken.

ARGUMENT

The Appeal Presents No Substantial Federal Question Necessitating Further Argument.

1. There here exists the close connection between the property which is subject to garnishment and the subject matter of the underlying lawsuit such that the minimum contacts required for compliance with due process standards by *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) and made applicable to quasi-in-rem actions by *Shaffer v. Heitner*, 433 U.S. 186 (1977) are met. In this case the property garnished was the liability insurer's obligation to defend and indemnify its insured, which obligation arose because of the accident constituting the underlying subject matter of the lawsuit. The Minnesota Supreme Court was correct in distinguishing this case from *Shaffer v. Heitner*, where the property requested bore no relation to the plaintiff's cause of action, but was merely a device to compel the defendant's personal appearance. Here, the property seized, the obligation, has no indepen-

dant significance apart from this type of litigation and in fact is being utilized for the very purpose for which it was procured. There thus exists more than the minimum contacts required for due process in *International Shoe* and *Shaffer*.

2. In the past this Court has twice refused to consider the procedure first established in *Seider v. Roth*, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312 (1966). This Court dismissed an appeal involving the propriety of attaching an insurer's obligation under state law in *Victor v. Lyon Associates, Inc.*, 21 N.Y. 2d 695, 287 N.Y.S. 2d 424, 234 N.E. 2d 459, appeal dismissed for want of a substantial federal question, *sub nom. Hanover Ins. v. Victor*, 393 U.S. 7, 89 S. Ct. 44, 21 L. Ed. 2d 385 (1968) and denied certiorari in a decision upholding the constitutionality of the *Seider* procedure in *Minichiello v. Rosenberg*, 410 F. 2d 106 (2nd Cir. 1968), cert. denied, 396 U.S. 844, 90 S. Ct. 69, 24 L. Ed. 2d 94, rehearing denied 396 U.S. 949, 90 S. Ct. 370, 24 L. Ed. 2d 254 (1969). Moreover, although appellant contends that the *Seider* procedure has been rejected in eleven states (J.S. page 11), in none of those decisions was the rejection grounded on a constitutional basis. Rather, in each state which rejected the procedure, the state courts, or the federal courts applying state law, concluded that the state garnishment statute itself did not support quasi-in-rem jurisdiction. Other courts, most notably, the Minnesota state and federal courts, have reached an opposite result. *Rintala v. Shoemaker*, 362 F. Supp. 1044 (D. Minn. 1973); *Jeans v. Mitchell, supra*. Courts have continued to uphold *Seider*-type jurisdiction in light of *Shaffer v. Heifner*. See *O'Connor v. Lee-Hy Paving Corp.*, 579 F. 2d 194 (2nd Cir. 1978); and *Alford v. McGaw*, 402 N.Y.S. 2d 499, 502 (N.Y. App. Div. 1978).

There is nothing about this present matter to suggest that it warrants further consideration by this Court.

CONCLUSION

On the basis of the arguments advanced and the authorities cited herein, it is respectfully submitted that appellee's motion to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of the State of Minnesota be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-952

RANDAL RUSH, et al.,

Appellants,

vs.

JEFFREY D. SAVCHUK,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLANTS' BRIEF

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TABLE OF CONTENTS

Page

Opinions Delivered in Courts Below i

Ground upon Which Jurisdiction is Invoked i

Statute Involved i

Question Presented for Review ii

Statement of the Case iii

Argument:

I. Background: *Seider v. Roth* 1

II. Quasi in Rem Jurisdiction: Impact of *Shaffer v. Heitner* 8

III. "Hybrid" Jurisdiction: Impact of *Shaffer v. Heitner* 14

IV. Conclusion 19

Bibliography 21

TABLE OF AUTHORITIES

Constitution of the United States of America:

Article IV, section 2 5
Amendment XIV, section 1 i

United States Statute:

28 U.S.C. §1257(2) i

Minnesota Statute:

4 Minn. Stat., §571.41(2) .....i, ii, 8

Cases:

Baden v. Staples, 45 N.Y. 2d 889, 383 N.E. 2d 110 (1978) 7
Chambers v. Baltimore & Ohio R. R. Co., 207 U.S. 142 (1907) 17
DeRentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969) 3
Donawitz v. Danek, 42 N.Y. 2d 138, 366 N.E. 2d 253 (1977) 5
Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973) 4
Grinnell v. Garrett, 295 So. 2d 496 (La. App. 1974) . 3
Hanson v. Denckla, 357 U.S. 235 (1958) 12, 19
Harris v. Balk, 198 U.S. 215 (1905) ..1, 2, 3, 5, 11, 13
Home Insurance Co. v. Dick, 281 U.S. 397 (1930) .. 13
Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967) 3
Howard v. Allen, 254 S. C. 455, 176 S.E. 2d 127 (1970) 3
International Shoe Co. v. Washington, 326 U.S. 310 (1945) .....ii, 2, 9
Jardine v. Donnelly, 413 Pa. 474, 198 A.2d 513 (1964) 3
Javorek v. Superior Court of Monterey County, 131 Cal. Rptr. 768, 552 P. 2d 728 (1976) 4
Johnson v. Farmers Alliance Mutual Insurance Co., 499 P. 2d 1387 (Okla. 1972) 3
Kirchman v. Mikula, 443 F. 2d 816 (5th Cir. 1971) . 3
Minichiello v. Rosenberg, 410 F. 2d 106, 117 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969) 2, 5, 15
O'Connor v. Lee-Hy Paving Corp., 579 F. 2d 194, 197, n. 2 (2d Cir. 1978), cert. denied, 47 U.S.L.W. 3386 (Dec. 4, 1978) 4, 5, 6, 15, 18
Pennoyer v. Neff, 95 U.S. 714 (1877) 8
Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970) ... 4
Robinson v. O. F. Shearer & Sons, Inc., 429 F. 2d 83 (3rd Cir. 1970) 3
Rush v. Savchuk, 433 U.S. 902 (1977) .....ii, 4
Savchuk v. Rush (I), — Minn. —, 245 N.W. 2d 624 (1976) .....i, 3, 10
Savchuk v. Rush (II), — Minn. —, 272 N.W. 2d 888 (1978) .....i, 5, 6, 11, 14
Shaffer v. Heitner, 433 U.S. 189 (1977) ..ii, iii, 4, 8, 19
Seider v. Roth, 17 N.Y. 2d 111, 216 N.E. 2d 312 (1966) 1
Simpson v. Loehmann, 21 N.Y. 2d 990, 238 N.E. 2d 319 (1968) 1, 3
State ex rel. Government Employees Insurance Co. v. Lasky, 454 S.W. 2d 942 (Mo. App. 1970) 4
Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1979) .. 3
Tessier v. State Farm Mutual Ins. Co., 458 F.2d 1299 (1st Cir. 1972) 3
Werner v. Werner, 84 Wash. 2d 360, 526 P. 2d 370 (1974) 4

OPINIONS DELIVERED IN THE COURT BELOW

Savchuk v. Rush, — Minn. —, 245 N.W.2d 624 (1976) (A. 29-46).

Savchuk v. Rush, — Minn. —, 272 N.W.2d 888 (1978) (A. 51-68).

GROUND UPON WHICH JURISDICTION IS INVOKED

In the foregoing opinions, the Minnesota Supreme Court held that 4 Minnesota Statutes, section 571.41, subdivision 2 (1971), as interpreted by that Court, is not repugnant to the United States Constitution, Amendment XIV, section 1—the Due Process Clause. Thus, jurisdiction of this Court is invoked pursuant to 28 United States Code, section 1257, subdivision 2.

Appellants asserted the constitutional issue at the inception of the litigation (A. 10-17). The motion of appellants to dismiss was denied by the trial court (A. 17-18), which order was thereafter affirmed by the Supreme Court of Minnesota (A. 29-39). Appeal was then taken to this Court, which vacated the Minnesota Supreme Court's judgment and remanded to the Minnesota Court (A. 52). Following remand, the Minnesota Supreme Court again held that Minnesota's exercise of jurisdiction herein did not violate the Due Process Clause (A. 52-61).

STATUTE INVOLVED

4 Minnesota Statutes, § 571.41(2) (1971), provides:

"Garnishment shall be permitted before judgment in the following instances only:

(1) For the purpose of establishing quasi in rem jurisdiction

(a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein wtih like intent; or

(b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or

(c) the defendant is a non-resident individual, or a foreign corporation, partnership or association.

(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

QUESTION PRESENTED

The Minnesota Court's construction of 4 Minn. Stat. § 571.41(2), in direct contravention of *Shaffer v. Heitner*, 433 U.S. 186 (1977), and of this Court's order, *Rush v. Savchuk*, 433 U.S. 902 (1977), grants to Minnesota courts quasi in rem jurisdiction over nonresident defendants who have absolutely no "minimum contacts" whatsoever with Minnesota in situations where the garnished "property" is not the subject of the litigation.

Thus, the question is: Does Minnesota's garnishment procedure pursuant to Minn. Stat. § 571.41(2), as interpreted by the Minnesota Supreme Court, offend the traditional XIVth Amendment due process standards of fairness and substantial justice enunciated in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), which standards are expressly made applicable to quasi in

rem proceedings by *Shaffer v. Heitner,* 433 U.S. 186 (1977)?

STATEMENT OF THE CASE

On January 13, 1972, Savchuk and Rush, both Indiana residents, were involved in an automobile accident in Elkhart, Indiana (A. 31). Savchuk was a passenger in the vehicle driven by Rush *(Id.)*. The vehicle was insured by State Farm pursuant to a standard automobile liability insurance policy which required State Farm to defend and indemnify Rush and further required Rush to cooperate in the defense of any suit against him (A. 15, 32, 25). The involved vehicle was registered in Indiana and insured in Indiana by a contract of insurance written and delivered in Indiana (A. 66). Indiana has a guest statute which precludes liability for damages to the injured guest unless the operator's conduct amounts to willful or wanton misconduct. (A. 58).

In June, 1973, Savchuk moved to Minnesota (A. 16, 31). In May, 1974, a prejudgment garnishment summons was served upon State Farm to attach its indebtedness to Rush (A. 2-3, 31). Disclosure was made by State Farm indicating no indebtedness (A. 4, 31). Thereafter, a supplemental complaint was served upon State Farm objecting to the disclosure and a summons and complaint seeking $125,000.00 in damages was served upon Rush in Indiana (A. 6-7, 31). The State Farm policy provided only $50,000.00 in coverage (A. 15).

Thereafter, appellants attacked the asserted quasi in rem jurisdiction on constitutional grounds in the District and Supreme Courts of Minnesota.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-952

RANDAL RUSH, et al.,

Appellants,

vs.

JEFFREY D. SAVCHUK,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLANTS' BRIEF

ARGUMENT

I.

Background: *Seider v. Roth*

The "constitutional history" of the instant case began with *Seider v. Roth*, 17 N.Y. 2d 111, 216 N.E. 2d 312 (1966), in which a New York resident, who was injured in a Vermont accident, sought to bring a quasi in rem action in New York against the alleged tortfeasor, a resident of Quebec, by attaching the Quebecois' liability insurance policy. At issue was a New York statute which permitted a plaintiff to attach a debt owed to the defendant to obtain quasi in rem jurisdiction over the defendant. The New York Court held that the policy constituted a debt (owed by the insurer to its insured) which was subject to attachment in New York because the insurer did business (i.e., was "present") in New York.

Shortly thereafter, *Seider* was directly attacked on due process grounds in *Simpson v. Loehmann*, 21 N. Y. 2d 990, 238 N.E. 2d 319 (1968), in which a majority of the New York Court held, pursuant to *Harris v. Balk*, 198 U.S. 215 (1905), that since a debt has a situs and may be attached in any state where the debtor is subject to in personam jurisdiction, no due process question exists. Thus, reasoned the Court, the fact that the non-resident's insurer is "present" in New York made the "debt" owed by the insurer to its insured constitutionally attachable in New York. The majority also noted that in assessing "fairness" pursuant to the due process clause, the fact that plaintiff was a resident of New York "looms large" (234 N.E 2d at 672). In the dissenting opinion, Judges Burke and Scileppi reasoned that the majority impermissibly stretched

Harris v. Balk because attachment of a contingent "debt" (such as the insurer's obligation to investigate and defend) cannot provide a basis for quasi in rem jurisdiction because the debt does not exist until it is adjudicated and the debt cannot be adjudicated until it is determined to exist within the forum; and the dissent prophetically suggested that attached property should provide a basis for quasi in rem jurisdiction only where there are such "minimum contacts" with the property that maintenance of the suit does not offend traditional notions of fair play and substantial justice (234 N.E. 2d at 678), citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The next constitutional attack on *Seider* occurred in the federal courts. In *Minichiello v. Rosenberg*, 410 F. 2d 106, 117 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969), the Court of Appeals, in a panel opinion, determined that since the New York courts considered *Seider* as a "judicially created direct action statute" and since the U.S. Supreme Court would (the Court of Appeals "believed") sustain the validity of such a statute, *Seider* was constitutionally permissible. However, a careful reading of the majority opinions in both *Seider* and *Simpson* must lead to the conclusion that the New York court declined to bottom its determinations on an analogy to a direct action statute and, as stated above, held that *Harris v. Balk* provided the constitutional basis for *Seider*.

In its opinion, the Court of Appeals considered other constitutional problems which are created by *Seider*, including the most troublesome of all—the fact that other states might give collateral estoppel effect to a *Seider* judgment against a defendant in an in personam action against that defendant in such another state, and concluded:

> "To be sure it may be cold comfort to a non-resident defendant to have our assurance that if some state should be so misguided as to consider a New York Seider judgment as concluding him, he will be able to have this ruling overturned by the Supreme Court of the United States." (410 F. 2d 112).

On a rehearing in banc (410 F. 2d 117 [2d Cir. 1968]), a majority of the Court of Appeals was constrained to sustain *Seider* solely on the basis of *Harris v. Balk*. The dissent (like the dissent in *Simpson v. Loehmann, supra*) also reasoned that *Seider* stretched *Harris v. Balk* too far, and also prophetically questioned the continued vitality of *Harris v. Balk* as not being "attuned to the modern jurisdictional search to attain substantial justice by balancing interests". (410 F. 2d at 112).

Additionally. it is interesting to note that a majority of the *Minichiello* court judges joined the majority of the *Simpson v. Loehmann* court judges in urging a complete re-examination of *Seider* "to hasten the day of its overruling or its annulment by legislation". (See 234 N.E. 2d 672-73, 674-75; 410 F. 2d 119).

In 1976, the constitutional scene shifted from New York to Minnesota when the instant case was first presented to the Minnesota Supreme Court: *Savchuk v. Rush*, — Minn. ——, 245 N.W. 2d 624 (1976) (A. 29-46).[1] In its

[1]In the meantime, all states (but one) which considered the adoption of *Seider v. Roth* procedure, declined to do so: *Robinson v. O. F. Shearer & Sons, Inc.*, 429 F. 2d 83 (3rd Cir. 1970) (federal maritime law); *Grinnell v. Garrett*, 295 So.2d 496 (La. App. 1974); *State ex rel. Government Employees Ins. Co. v. Lasky*, 454 S. W. 2d 942 (Mo. App. 1970); *Johnson v. Farmers Alliance Mutual Ins. Co.*, 499 P. 2d 1387 (Okla. 1972); *Jardine v. Donnelly*, 413 Pa. 474, 198 A. 2d 513 (1964); *DeRentiis v. Lewis*, 106 R. I. 240, 258 A. 2d 464 (1969); *Howard v. Allen*, 254 S. C. 455, 176 S. E. 2d 127 (1970); *Housley v. Anaconda Co.*, 19 Utah 2d 124, 427 P. 2d 390 (1967). See also, *Tessier v. State Farm Mutual Ins. Co.*, 458 F. 2d 1299 (1st Cir. 1972); *Kirchman v. Mikula* 443 F. 2d 816 (5th Cir. 1971); *Sykes v. Beal*,

opinion, the Minnesota Court held that there was a threefold test for determining the constitutionaliy of Minnesota's garnishment statute:

> "(1) proper notice must be given to the defendant-insured affording him adequate opportunity to defend his property; (2) the defendant cannot be exposed to liability greater than the amount of his insurance policy; (3) the procedure may be utilized only by residents of the forum state". (A. 34-35; 245 N.W. 2d 628).

Additionally, the Court in *Savchuk I* reasoned that sufficient minimum contacts exist because (a) the insurer does business in Minnesota, and (b) the state has a legitimate interest in providing its residents with a forum (A. 37; 245 N.W. 2d at 629).

Then came this Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and its order vacating the Minnesota Supreme Court's judgment in the instant case and remanding it to the Minnesota Court "for further consideration in light of" *Shaffer: Rush v. Savchuk*, 433 U.S. 902 (1977).[2]

Following *Shaffer*, a swarm of cases (as from an angry beehive) erupted in New York. Some New York state and federal courts determined that *Shaffer* overruled *Seider;* others that it did not.[3] Ultimately the question was again presented to the U.S. Court of Appeals: *O'Connor v. Lee-*

392 F. Supp. 1089 (D. Conn. 1975); *Ricker v. Lajoie*, 314 F. Supp. 401 (D. Vt. 1970). Subsequently, two more states have done the same: *Javorek v. Superior Court of Monterey County*, 131 Cal. Rptr. 768, 552 P. 2d 728 (1976); *Werner v. Werner*, 84 Wash. 2d 360, 526 P. 2d 370 (1974).

The one exception is New Hamshire which adopted *Seider* solely in retaliation to New York's use of *Seider* against New Hampshire residents. *Forbes v. Boynton*, 113 N. H. 617, 313 A. 2d 129 (1973).

A short bibliography of articles, notes and comments critical of *Seider v. Roth* appears at the end of this brief.

Hy Paving Corp., 579 F. 2d 194 (2d Cir. 1978), cert. denied sub nom., *Lee-Hy Paving Corp. v. O'Connor*, — U.S. —, 47 U.S.L.W. 3386 (Dec. 4, 1978). In *O'Connor*, the Court departed from the *Harris v. Balk* basis which it had used to sustain *Seider*-type actions in *Minichiello v. Rosenberg*, 410 F. 2d 117 (2d Cir. 1968) (discussed above), and concluded that the *Seider v. Roth* procedure was really sui generis (579 F. 2d 202, n. 11). In arriving at this conclusion, the Court reasoned: (1) a judgment for plaintiff will deprive the defendant of nothing; (2) the insurance policy is not wholly unrelated to the litigation; (3) the insurer controls all aspects of the litigation; (4) the defendant is only a mere witness and has no more interest in the litigation than a "casual ejector"; (5) what is at stake is the payment by the insurer of plaintiff's damages; (6) the new bias of the courts is to permit the plaintiff to insist that the defendant come to him; (7) plaintiff's damage witnesses are readily available to him in his home state and, since a large proportion of *Seider* cases are settled, there is no particular interest in requiring the action to be brought in the accident state; and (8) the greater liberality of New York juries is not of constitutional magnitude. Thus,

[2]Ten days before *Shaffer*, New York decided that a nonresident could not use *Seider* to obtain jurisdiction in New York because the defendant's insurer's duty to defend, etc., was not of "sufficient substance to support quasi in rem jurisdiction". *Donawitz v. Danek*, 42 N. Y. 2d 138, 366 N. E. 2d 253 (1977). Concurring and dissenting opinions pointed out that an insurer's duty to defend, etc., could not become substantial or insubstantial depending on whether the attaching party was a resident or a nonresident; and concluded that a refusal to allow a nonresident to use the *Seider* procedure presented very substantial privileges and immunities and equal protection problems, and amounted to a state depriving nonresidents of a privilege of citizenship in violation of U. S. Const., Art. IV, §2. While these constitutional questions are not before the Court in the instant case, the fact that they exist is just one more reason why *Seider* is an unconstitutional doctrine.

[3]Some of these cases are summarized in *O'Connor v. Lee-Hy Paving Corp.*, 579 F. 2d 194, 197, n. 2 (2d Cir. 1978); and in *Savchuk v. Rush*, 272 N.W . 2d 888, 891 (Minn. 1978) (A. 57-58).

reasoned the Court, since the insurer in subject to in personam jurisdiction in New York, *Shaffer* is inapplicable.[4]

After reconsidering the matter in light of *Shaffer*, the Minnesota Court adhered to its earlier decision in the instant case, albeit on grounds far different from those adopted in *O'Connor v. Lee-Hy Paving Corp., supra: Savchuk v. Rush*, — Minn. —, 272 N.W. 2d 888 (1978) (A. 51-68). In *Savchuk II*, a majority of the Minnesota Court reasoned:

> 1. That the consequences of *Shaffer v. Heitner, supra*, are "not clear" (A. 56; 272 N.W. 2d 890-91);
>
> 2. That "Minnesota's legitimate interest in facilitating recoveries for resident plaintiffs not only requires provision of a local forum, but may override [sic] traditional choice of law analysis" (A. 58-59; 272 N.W. 2d 891-92);
>
> 3. "It cannot be said that Minnesota lacks such minimally-requisite contacts, ties or relations to those defending parties as to offend the requirements of due process" (A. 61; 272 N.W. 2d 893).

In addition, the majority ruled that in *Seider*-type cases, Minnesota courts would apply Minnesota substantive law. (A. 58; 272 N.W. 2d 891, n. 5).

The dissenting opinion of Mr. Justice Otis (in which two other Justices concurred) quite correctly pointed out that—

> "The inference to be drawn from this remand [by the United States Supreme Court] is not, in my opinion, that we are free to distinguish Shaffer and reinstate the judgment vacated by the Supreme Court. As

[4]In *O'Connor*, the Court of Appeals also determined that in *Seider v. Roth* actions, it was proper to apply New York substantive law rather than the substantive law of the place of the accident.

> I construe it, we are simply afforded an opportunity to revise our decision to conform to Shaffer on the assumption we would have reached a different conclusion had Shaffer been decided when we wrote Savchuk. Any other inference would lead to the unlikely conclusion that the Supreme Court was merely delegating to us its responsibility to resolve a difficult constitutional question.
>
> "Three specific rules recognized in Shaffer dispose of the jurisdictional issue here presented.
>
> "First. A forum state acquires no jurisdiction either in rem or in personam merely by the location in that state of property owned by defendant, unless such property is the subject of the litigation. Otherwise it is available only to satisfy a judgment. 433 U.S. 210-13, 97 S. Ct. 2583-84, 53 L. ed. 2d 701-03.
>
> "Second. In order to obtain either in rem or in personam jurisdiction the *defendant* must have certain minimum contacts with the forum state 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" '. 433 U.S. 203, 97 S. Ct. 2580, 53 L. ed. 2d 697.
>
> "Third. It is the relationship among the defendant, the forum, and the litigation which is the basis for jurisdiction over a nonresident, not their relationship with the *plaintiff*. 433 U.S. 208-09, 97 S. Ct. 2582-83, 53 L. ed. 2d 700-01." (A. 61-62; 272 N. W. 2d 893; emphasis by the Court).

Four days after *Savchuk II*, the New York Court again determined the propriety of *Seider: Baden v. Staples*, 45 N.Y. 2d 889, 383 N.E. 2d 110 (1978). In *Baden*, the Court reasoned that since *Shaffer* did not repudiate *Seid-*

er, Seider satisfies the jurisdictional standards set forth in *Shaffer*. The Court also echoed the *O'Connor v. Lee-Hy Paving Corp., supra,* principle that since the dispute is between a New York plaintiff and an insurer doing business in New York, it is not injustice to adjudicate the matter in New York; and concluded "it is more important that the law be settled than it be settled 'correctly' ".

II.

Quasi in Rem Jurisdiction: Impact of *Shaffer v. Heitner*

As previously stated, the basic issue presented by the instant case is the constitutionality of the quasi in rem procedure utilized by appellee to gain jurisdiction over the nonresident defendant-appellant. However, because of the sui generis or hybrid characterizations of *Seider v. Roth,* a brief mention of those matters is also appropriate.

In the present case, a quasi in rem statute, 4 Minn. Stat., §571.41(2) (1971), was used to obtain quasi in rem jurisdiction. A nonresident's "debt" was garnished (attached) in Minnesota, and the Minnesota Supreme Court concluded that this procedure resulted in the acquisition of quasi in rem jurisdiction which did not violate due process.[5] In this regard, the Minnesota Court erred in declining to follow the teaching of *Shaffer v. Heitner,* 433 U.S. 189 (1977).

In *Shaffer,* this Court overruled a long line of precedent founded on *Pennoyer v. Neff,* 95 U.S. 714 (1877). *Pennoyer* had held that a state's authority to adjudicate is based on the state's power over persons *and property* located within its boundaries. *Pennoyer* was substantially

[5]In its opinion, the Minnesota Court referred to the matter as "this type of quasi in rem jurisdiction." (A. 61; 272 N.W.2d 893).

modified in *International Shoe v. Washington,* 326 U.S. 310 (1945), in which it was held that a state may assert in personam jurisdiction over a nonresident without violating the nonresident's due process rights if the nonresident has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. This Court also held that the due process clause does not contemplate that a state may make binding a judgment in personam against an individual with whom "the state has no contacts, tie or relations." (326 U.S. at 319). Concerning *International Shoe,* this Court noted in *Shaffer* that in respect to in personam actions, "the relationship among the defendant, the forum and the litigation . . . became the central concern of the inquiry into personal jurisdiction" (433 U.S. at 204).

In *Shaffer* this Court was asked to extend its tripartite analysis of *International Shoe* to the determinations of due process standards required for the constitutional exercise of jurisdiction in actions in rem as well as in personam. This Court responded by holding—

> "The standard for determining whether an exercise of jurisdiction over the interests of persons [i.e., property rights] is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*" (433 U.S. at 207).

In the type of quasi in rem jurisdiction herein involved—where the "only role played by the property is to provide a basis for bringing the defendant into court", and where the "property which now serves as the basis for state court jurisdiction is completely unrelated to plaintiff's cause of action" (433 U.S. at 209)—this Court determined:

> "In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible"(433 U. S. at 209).

The parallels between *Shaffer* and the instant case are cogent. Here, as in *Shaffer*, plaintiff seeks to apply what he concedes to be the "property" of defendant to satisfy a claim against defendant. Here, as in *Shaffer*, the garnished property is unrelated to plaintiff's claim against defendant. Here, as in *Shaffer*, there are absolutely no contacts between the defendant and the forum. It follows, in the language of *Shaffer*, that since a direct assertion of personal jurisdiction over defendant would violate the Constitution, Minnesota's indirect assertion is equally impermissible, and that Minnesota should only have jurisdiction to attach defendant's property

> ". . . as security for a judgment being sought *in a forum where the litigation can be maintained consistently with International Shoe.*" (433 U.S. at 210; emphasis supplied).

The foregoing analysis is fortified by an examination of the reasoning of the majority opinions of the Minnesota Supreme Court in the present case.

In *Savchuk v. Rush I*, the Court ruled that due process was satisfied because there was adequate out-of-state notice to defendant, liability in Minnesota was limited to the policy limits, and the procedure was limited to Minnesota plaintiffs (A. 34; 245 N.W.2d 629). The Court felt that there were sufficient minimum contacts with Minnesota because the insurer was "present" in Minnesota and Minnesota has an interest in providing its residents with a Minnesota forum (A. 37; 245 N.W. 2d 629).

Following this Court's decision in *Shaffer v. Heitner* and its vacation of the judgment in *Savchuk v. Rush I*, the Minnesota Court in *Savchuk v. Rush II* reiterated the above points (A 53; 272 N.W. 2d 889); characterized *Seider v. Roth* as a "hybrid" which "does not rest exclusively on *Harris v. Balk*." (A. 59; 272 N.W. 2d 892); and ruled that:

> "We view as relevant the relationship between the defending parties, the litigation, and the forum state. It cannot be said that Minnesota lacks such minimally requisite 'contacts, ties, or relations' to these defending parties as to offend the requirements of due process. In view of our consistent policies of providing a forum to residents of this state and extending our jurisdiction to the maximum limits consistent with due process, we decline to reverse our prior decision." (A. 61; 272 N.W. 2d 893).

In essence, the Minnesota Court, by its reference to "defending parties" (i.e., the defendant and his insurer),[6] has departed from the *Shaffer v. Heitner* mandate that the central concern be the relationship among the defendant, the forum and the litigation; and has substituted a new "central concern"—the relationship among the *plaintiff*, the forum and the *insurer*.

Thus, Minnesota (like the New York courts) has determined that plaintiff's contacts with the forum are paramount— if not controlling—in satisfying due process.[7]

---

[6]The *insurer*, of course, is not a defendant—it merely has a contractual obligation to pay the fees charged by the attorney selected to represent the defendant.

[7]In addition, the Minnesota Court held that plaintiff's residence in Minnesota is *essential* to due process, reasoning that if plaintiff were a nonresident, the garnishment procedure would be unconstitutional (A. 35; 245 N.W.2d 628. A. 53; 272 N.W.2d 889). How can a procedure be rendered constitutional by restricting the use of that procedure to residents when the state may not constitutionally deprive nonresidents from the use of the same procedure? See note 2, *supra*.

While the Minnesota courts may have a concern to provide a Minnesota resident (however transitory or temporary that resident may be) with a Minnesota forum, that concern does not come close to satisfying the fairness requirement of due process. The question is not due process as to a plaintiff who certainly has a valid forum available to him following the accrual of his cause of action.[8] The question is due process as to the "defending parties"—can they be fairly hailed before a forum as to which they have no contacts vis-a-vis the litigation? Furthermore, the Minnesota court's decision to extend its jurisdiction to the constitutional maximum does not establish due process; it merely begs the question of what are the applicable due process limits. Thus, the relationship between the plaintiff and the forum is not paramount; it is immaterial.

What about the contacts between the forum and the "defending parties"? The defendant has absolutely no contacts with Minnesota. Thus, as Chief Justice Sheran recognized in *Savchuk I*, personal jurisdiction over the defendant in the present case could not be constitutionally justified (A. 16; 245 N.W.2d 629). See *Hanson v. Denckla*, 357 U.S. 235 (1958).

If the insurer be deemed a defending party, its only direct contact with Minnesota is that it, fortuitously, does business there. It is "present" and thus subject to in personam jurisdiction. But the "attached" insurance policy is an Indiana contract written and issued to an Indianan in Indiana. There is no dispute among the parties as to the existence or meaning of the policy requiring judicial

[8]In the instant case, plaintiff could have sued the defendant in Indiana for the one and one-half years that plaintiff remained an Indiana resident, and could have sued the defendant in Indiana following plaintiff's emigration to Minnesota until the Indiana statute of limitation had run.

construction. Thus, the policy is not the subject matter of the litigation. Instead, the policy merely provides contingent obligations to the Indiana insured. the defendant, which (per the overruled *Harris v. Balk* doctrine) are fictionally "present" in Minnesota and thus (according to the Minnesota Court) subject to a fictional seizure there. The insurer's "presence" in Minnesota is wholly unrelated to the contract it made in Indiana, or to the Indianan with whom it contracted. As noted in *Shaffer*, the seized property was not the subject matter of the litigation (433 U.S. 213) and the "only role played by the property is to provide a basis for bringing the defendant into court" (433 U.S. at 209).

In this regard, *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), is apposite. There a Texan attempted to obtain jurisdiction in Texas over a Mexican corporation by garnishing the corporation's insurer in Texas. The policy was made in Mexico and related to activities in Mexico. All of plaintiff's pertinent activities were in Mexico. This Court rejected plaintiff's in rem jurisdictional claim because Texas had no sufficient contacts with the defendant or the underlying action, noting that—

> "The fact that Dick's permanent residence was in Texas is without significance. At all times material, he was physically present and acting in Mexico" (281 U.S. 408).

So too in the present case—at all times material, plaintiff was physically present and acting in Indiana. Thus, his later-acquired residence in Minnesota is without significance.

Can it be said that the seized property has some relationship to the litigation? No. The underlying litigation in-

volves the questions of whether or not plaintiff and defendant were negligent, proximate causation and damages. The situation is the same as the second type of quasi in rem action described in *Shaffer* (433 U.S. at 208-209). Defendant's ownership of the Indiana policy and the insurer's presence in Minnesota are conceded; however, plaintiff's cause of action is not related to defendant's rights and duties arising out of ownership of the Indiana policy. The policy's only relationship is, at best, tangential because it provides security in the event plaintiff is successful in the underlying litigation. So too could the seized stock in *Shaffer* be used for that purpose. Defendant's ownership of an insurance policy has no more relationship with plaintiff's negligence claim than Shaffer's ownership of stock with Heitner's shareholder suit.[9]

III.

"Hybrid" Jurisdiction: Impact of *Shaffer v. Heitner*

In *Savchuk II*, the Minnesota Court labelled the *Seider* procedure as "hybrid" and stated:

[9]This Court, in *Shaffer*, determined that the seized stock was unrelated to the shareholders suit regardless of the claim that Delaware had an interest in policing its corporations, controlling the activities of officers and directors of its corporations, and of having its law applied in respect to such matters. For some reason, the Minnesota Court in *Savchuk II* believed that *Seider v. Roth* jurisdiction differed from the attachment procedure used in Delaware because the latter procedure could not "guarantee" jurisdiction over all defendants (A. 56; 272 N.W.2d 891). The Minnesota Court neglected to note that in many *Seider* situations, significant parties are not sued simply because their insurers do not do business in the forum state with the result that total liability may be placed on a defendant whose conduct played only a minor part in the tort.

> "In the accident litigation, however, it [the insurance policy] is inevitably the focus, determining the rights and obligation of the insurer, the insured and practically speaking, the victim." (A. 59; 272 N.W. 892).

This statement, plus the accompanying references to *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 192 (1978), and *Minichieilo v. Rosenberg*, 410 F.2d 217 (2d Cir. 1968), (see A. 59; 272 N.W.2d 892, n. 6), require a brief discussion of the so-called hybrid or sui genius nature of *Seider*.

As previously noted, the *Minichiello* and *O'Connor* courts reasoned, in effect, that the insurer was the real defendant because the real defendant had no real interest in the litigation. While this might be true in the limited fender-bender situation, it is far from correct in a vast number of cases.[10]

The *Seider* cases discussed above range from negligence cases to professional malpractice cases, construction cases, products liability cases, etc. And while these cases generally involve some sort of claimed personal injury, it must be recognized that *Seider* procedure is equally available in respect to claims for economic losses arising out of alleged lawyers', architects', engineers', accountants', bankers', officers', and directors' malpractice—to name a few. Indeed, as this Court surely recognizes, since insurance may be obtained to cover almost every aspect of the entire spectrum of human activity, the *Seider* procedure is virtually boundless. Thus, the *Minichiello*, *O'Connor* and *Savchuk* courts' characterizations of the status of the defendant and his insurer must be examined accordingly.

In many of the above situations, much more than money is involved. In professional malpractice and products li-

[10]Even in automobile litigation, defendants often have a personal, *human* interest in having (what they believe to be) justice done. They resent the allegations against them and understandably desire that they be determined not to be at fault.

ability cases, for example, the integrity of the insured person or product is deeply involved. The insured has a substantial personal interest in seeing that he or his product is vindicated. The defendant is much more than a mere witness who has no more interest in the litigation than a "casual ejector"! And, in respect to products liability litigation, the spectre of a *Seider* judgment being given collateral estoppel effect in subsequent litigation by other claimants remains very real. In this regard, many commercial and professional liability policies forbid settlement without the insured's consent. In all types of litigation, the policy often does not provide for adequate compensation to an insured who must leave his family and employment, journey far from home, and perhaps spend many days attending the trial.[11] In all types of litigation, an adverse verdict may affect the insured's premium status (e.g., rated insurance) or even his ability to secure insurance in the future. In all types of litigation, liability witnesses reside in the *locus delicti* and the testimony of those witnesses is unavailable elsewhere except by the cumbersome, unimpressive deposition procedure. In many types of litigation, it is desirable to have a view of the accident scene, and to have jurors drawn from the accident area. In all types of litigation, the defendant may be required to relitigate the same matter from beginning to end in an in personam action in the *locus delicti*. In the commercial areas, it is not uncustomary for the policy to provide that the insured will conduct his own defense—and often these policies contain substantial deductibles wherein

[11]The use of depositions usually is no substitute for available live testimony. Juries draw incorrect conclusions from the absence of parties. The defendant (and his insurer) are entitled to have the jury see and hear him—face to face—in order to properly judge his veracity, candor, etc.

the insured is, in effect, self-insured for the first "layer" of his possible liability.[12] Additionally the defendant may be deprived of his right to join or implead essential parties because their insurers do not do business in the forum state—a situation seldom encountered in the state where the cause of action accrued because of the prevalence of long-arm statutes.

Thus, in the vast majority of litigation as to which insurance is applicable, the defendant is a very real defendant—he is no mere witness who has no more interest than Judge Friendly's strawman. As this Court noted in *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907), the right to participate in one's own defense—

> ". . . is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizen of all other states. . . ."

Finally, the Minnesota and New York courts have announced that, in *Seider* quasi in rem cases, they will apply the *lex fori* rather than the law of the place where the cause of action accrued. This declaration compounds the unconstitutionality of *Seider* by often depriving the defendant (and his insurer) of substantive due process by transmuting nontortious conduct into a tort, by depriving the defendant of defenses otherwise available, by tolling applicable statutes of limitations, and so on and on. For example, suppose a product is not defective or a physician's conduct does not constitute malpractice pursuant to the law of the accident state; but the product may be found

[12]Apparently no one yet has considered the impossible constitutional effect of a *Seider* seizure of this kind of policy.

defective, or the conduct, malpractice, in a *Seider* state. In this situation, a defendant who is jerked from his home state to a far away jurisdiction may find himself saddled with an obligation which he did not owe in his home state.

In the present case, plaintiff and defendant, both Indianans, engaged in a course of conduct in Indiana which was in every respect controlled by Indiana law. Now, because of *Seider*, defendant is compelled to defend himself far from home, shorn of the protection of the Indiana guest statute (an absolute defense) and the Indiana statute of limitation. In addition, he must defend himself pursuant to the Minnesota comparative negligence law rather than the Indiana contributory negligence law. Not only is he subjected to a new jurisdiction—he is subjected to a whole new body of law which was entirely inapplicable to him before plaintiff started his *Seider* action in Minnesota. (See A. 58; 272 N.W. 891, n. 5)

So too in *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978). There plaintiff's decedent was killed in a Virginia construction accident. Pursuant to Virginia law, plaintiff's sole remedies were provided by the Virginia workmen's compensation statute. However, the Court of Appeals, after determining that the case was constitutionally "Seidered" into New York, held that, pursuant to New York law, plaintiff was entitled to prosecute a wrongful death action against the defendants. (See 579 F.2d 202-206).

Thus, once the constitutional nexus is assumed to be the relationship among the plaintiff, the forum and the insurer (instead of the relationship among the defendant, the forum and the litigation), the result is that the forum state will then unconstitutionally ignore the interests of the accident or occurrence state to establish the legal rights and

obligations of the accident state's residents, and it will deprive those residents (and their insurers) of the protection of the law of their home state pursuant to which they have conducted their affairs. This result is unconstitutional because of its gross unfairness to the "defending parties"—it is a wholly unreasonable application of local law which violates the standards mandated by our federal system. See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Minnesota does not have the right to impinge the rights of the State of Indiana and its residents in this manner.

IV.

CONCLUSION

In *Shaffer v. Heitner*, this Court, in the clearest terms, mandated that—

> "We therefore conclude that *all assertions of state-court jurisdiction* must be evaluated according to the standards set forth in International Shoe and its progeny." (433 U.S. at 212; emphasis supplied).

Minnesota and New York have chosen to ignore the word "all" in the foregoing declaration and have created what they chose to term a hybrid or sui generis kind of jurisdiction which is somehow to be immune from the *International Shoe* standards. They have focused on the residency of the plaintiff, the forum, and the fortuitous presence of an insurer within the forum as establishing a permissible jurisdictional basis. They have totally ignored the relationship of the defendant, of his insurer, and of the litigation to the forum.

There is no doubt that the jurisdictional basis utilized

by *Seider v. Roth* and *Savchuk I* is invalid pursuant to *Shaffer*. That basis cannot be transmuted into a valid basis by applying to the self-same procedure appellations such as hybrid or sui generis. If it's invalid, it's invalid.

Since, in the instant case, there are absolutely no contacts between the forum on one hand and the defendant and the litigation on the other, it follows that Minnesota's use of a quasi in rem procedure to acquire jurisdiction constitutes a violation of the Due Process Clause and the decision of the Minnesota Court should be overruled.

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IN THE

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October Term, 1978

No. 78-952

RANDAL RUSH, et al.,

Appellants,

vs.

JEFFREY D. SAVCHUK,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLEE'S BRIEF

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TABLE OF CONTENTS

Page

Argument:

I. Background: *Seider v. Roth* 1

II. *In Rem* Jurisdiction: Impact of Shaffer v. Heitner 4

III. Distinguishing *Savchuk* from Shaffer 10

IV. Establishing Minimum Contacts 13

Conclusion 16

TABLE OF AUTHORITIES

Statutes:

Minnesota Statute § 571.41(2) 3

Cases:

Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1939) 11

Forbes v. Boyton, 313 A.2d 129 (N.H. 1973) 3

Hess v. Pawlowski, 274 U.S. 352 (1927) 5

International Harvester Co. v. Kentucky, 234 U.S. 579 (1914) 5

International Shoe v. Washington, 326 U.S. 310 (1945) 2, 6, 8, 9, 11, 13, 14

Jeans v. Mitchell, 418 F.Supp. 730 (D.Minn. 1976) .. 3

Milliken v. Meyer, 311 U.S. 457 (1940) 5, 6

Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), cert. den. 393 U.S. 844, reh. den. 396 U.S. 949 (1969) 3

O'Connor v. Lee Hy Paving Corp., 379 F.2d 194 (2d Cir. 1978), cert. den. — U.S. —, reh. den. — U.S. — (1979) 14

Pennoyer v. Neff, 95 U.S. 714 (1877) 5

Philadelphia and R.R. Co. v. McKibbin, 243 U.S. 264 (1917) 5

Rintalla v. Shoemaker, 362 F.Supp. 1044 (D. Minn. 1973) 3
Seider v. Roth, 17 N.Y.2d 111, 215 N.E.2d 312, 287 N.Y.S.2d 99 (1966) .1, 2, 4, 7, 8, 9, 10, 13, 14, 15
Shaffer v. Heitner, 433 U.S. 902 (1977) 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
Simpson v. Lohmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1975) 2, 3

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APPELLEE'S BRIEF

ARGUMENT

I.

BACKGROUND: Seider v. Roth

The procedure followed by the plaintiff herein to obtain *in rem* jurisdiction over the defendant by garnishing the obligation owed to the defendant by his insurance company received initial court approval by the New York Court of Appeals in *Seider v. Roth*, 17 N.Y.2d 111, 215 N.E.2d 312, 287 N.Y.S.2d 99 (1966). In *Seider* as in the instant case, the plaintiffs were residents of the forum state and were in-

jured in an out-of-state automobile accident caused by the negligence of an out-of-state defendant. The plaintiff in each case obtained *in rem* jurisdiction over the defendant by either attaching or garnishing the contractual obligation of defendant's insurance carrier to defend and indemnify the defendant. The insurance carrier, in each case, while not a corporation of the forum state, did have offices and did conduct business within the forum and was subject to regulation by that state. Based on those facts, the Court of Appeals in *Seider* found that the insurer's contractual obligation constituted a debt within the meaning of the applicable statute and could therefore be attached. Jurisdiction was then property acquired by this attachment.

The following year the New York Court of Appeals was asked to reconsider its decision in *Seider* based upon federal constitutional grounds. In *Simpson v. Lohmann,* 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1975), the New York Court again upheld the constitutionality of the attachment procedure. In so doing that Court correctly recognized that the traditional distinctions between *in rem* and *in personam* jurisdiction were disappearing and that the rigid tests previously used to determine jurisdictional issues were being replaced by a "more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness." 234 N.E.2d at 672. That court then examined the situation in terms of the standard of fairness established in *International Shoe v. Washington,* 326 U.S.310 (1945). The New York Court recognized that application of such a standard required

> a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat mag-

> ical and midieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation (citations omitted). Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the state has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large. *Id.*

Following *Simpson,* other federal and state courts have also upheld the constitutionality of the *Seider* procedure. *Minichiello v. Rosenberg,* 410 F.2d 106 (2d Cir. 1968), cert. den. 393 U.S. 844, reh. den. 396 U.S. 949 (1969); *Rintalla v. Shoemaker,* 362 F. Supp. 1044 (D. Minn. 1973); *Jeans v. Mitchell,* 418 F. Supp. 730 (D. Minn. 1976); *Forbes v. Boynton,* 313 A.2d 129 (N.H. 1973). In each case the court chose to examine the realities of the situation, the fact of the plaintiff's residence within the forum state, the active and controlling role played by the insurance company and the nature of the res attached, that being the obligation to defend. Thus, even before being compelled to do so by *Shaffer,* courts have examined the *Seider* attachment procedure with regard to the standard of *International Shoe* and have not found it to be lacking.

The instant case was the first opportunity the Minnesota Supreme Court had to address the constitutionality of the *Seider* procedure. In its initial opinion that Court upheld Minn. Stat. §571.41, Subd. 2 against constitutional attack

on the grounds that (1) defendant received proper notice, adequate to defend his property; (2) defendant's exposure was limited to the policy limits of his insurance contract and (3) plaintiff was a resident of the state at the time the action was commenced (A-37). This last requirement was expressly imposed

> since without this connection the state would lack sufficient meaningful contacts with the suit to justify the exercise of jurisdiction (A-37, note 6).

Thus, the Minnesota Court was already well aware of the need to apply a standard of fairness in determining this constitutional question.

II.

In Rem Jurisdiction: Impact of Shaffer v. Heitner

Following the Minnesota Supreme Court's decision in *Savchuk* I, there ensued an appeal to this Court (A-48). This court vacated and remanded the matter to the Minnesota Supreme Court for further consideration in light of a decision handed down after the Minnesota Court had initially decided the case. Appellants now argue that the Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 902 (1977) invalidated the *Seider* type attachment which forms the basis for *in rem* jurisdiction used in *Savchuk*. For those reasons, it is appropriate to ascertain what role *Shaffer* has and whether or not it promulgates new principles which require a rejection of the limited jurisdiction procured under *Seider* type attachments.

The decision in *Shaffer* was but one case in a long progression of decisions from this Court which have attempted

to deal with the elusive concepts of jurisdiction. As was recognized therein, this progression really began with the century old case of *Pennoyer v. Neff*, 95 U.S. 714 (1977) which established "the basic elements of the constitutional doctrine governing state court jurisdiction." 433 U.S. at 213. In *Pennoyer*, this Court formulated a theory of jurisdiction founded upon the concept of physical presence within the territorial confines of a state. At that time two distinct classifications emerged, that classified as jurisdiction in *personam*, which was founded upon an individual's physical presence within a state and jurisdiction *in rem*, that founded upon the actual presence of property within a state. An action could proceed *in rem* even though the owner of the property was not within the state or subject to personal jurisdiction, because the action was considered to be directly against the property and the owner was regarded as being only incidentally affected by the litigation.

These tenuous distinctions ultimately led to the establishment of two separate lines of authority in which concepts of *in rem* jurisdiction developed and matured differently from those *in personam*. The progression on the side of *in personam* jurisdiction was a gradual change from recognizing only physical presence as a basis of jurisdiction to the utilization of other indicia. The impetus for this move was a recognition of the realities of such things as interstate travel, and interstate corporate activities. See *Hess v. Pawloski*, 274 U.S. 352 (1927); *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); *Philadelphia and R.R. Co. v. McKibbin*, 243 U.S. 264 (1917); *Milliken v. Meyer*, 311 U.S. 457 (1940). Accompanying this progression was a change in the considerations a court was re-

quired to examine in determining whether jurisdiction was proper. These considerations were finally enunciated in the landmark case of *International Shoe v. Washington,* 326 U.S. 310, 316 (1945) wherein Mr. Chief Justice Stone writing for the Court stated:

> "But now that the *capias ad Respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U.S. 457, 463.

This Court did not and has not required that these contacts be the best possible contacts, but rather contacts of such a nature which "make it reasonable in the context of our federal system of government to require the corporation to defend the particular suit which is brought here." *Id.* Thus, the inquiry for purposes of *in personam* jurisdiction became one into the relationship between the defendant, the forum and the litigation. *Shaffer,* 433 U.S. at 204.

As this Court recognized in *Shaffer, Id.,* development of the *in rem* side of the jurisdiction question did not keep pace. Judicial inquiry remained limited to a determination of the present location of the res. There were no counterveiling considerations similar to those outlined in *International Shoe* which needed to be examined. If property could be located within a state, that was sufficient to give that state jurisdiction.

There were, however, problems with such an approach. The concept of presence as a basis for jurisdiction was

workable when applied to tangible items, such as real property because there generally was a sufficient nexus with the state to make it reasonable for an owner to expect suit there. The concept worked less well when applied to highly mobile items or intangible pieces of property, for with such items it was likely that suit could be brought in a state where the owner could hardly envision himself being subjected to suit and where the state had an interest only because it was the present situs of the property.

It was those latter problems which this Court sought to address and correct in *Shaffer* and it is there that *Shaffer* has its true impact. First came the recognition that *in rem* jurisdiction is in reality "jurisdiction over the interests of persons in things." 433 U.S. at 209. This then led naturally to the imposition of the due process requirement of the minimum contacts standard of fairness as a prerequisite to the extension of *in rem* jurisdiction. *Id.*

Thus, the true impact of *Shaffer* is not in the abolition of *in rem* jurisdiction, for that concept remains a useful and necessary one. Rather, it is in the requirement that there be more than the mere presence of a res in order to justify state court extension of jurisdiction. Presence alone is insufficient, there must instead be a relationship between the forum, the parties, the property and the litigation.

To acquire this result it was necessary to overrule some cases which had been established precedent for many years. It is one of appellant's contentions that this action sounded the death knell for *Seider* type cases because the sole constitutional basis for *Seider* was provided by these overruled cases. An examination of what this Court actually did in this regard demonstrates the fallacy of that argument.

The key language appears to be located in Part III of

the majority opinion wherein Mr. Justice Marshall writing for the Court states:

> "We therefore conclude that all assertions of state court jurisdictions must be evaluated according to the standards set forth in International Shoe and its progeny."[39]
>
> 39 It would not be fruitful for us to reexamine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled. 433 U.S. at 212.

Thus, the fact that some of the cases supporting *Seider* type jurisdiction cited *Harris* does not per se render those cases invalid, for not every case citing either *Harris* or *Pennoyer* is necessarily overruled by *Shaffer*. It is only when *Harris* is used to support an extension of *in rem* jurisdiction inconsistent with the principles of *International Shoe* that such case must now fall.

The *Harris* case is an important one and an understanding of why it was overruled is vital. The facts in *Harris* are complicated, and as they are more than adequately summarized in *Shaffer* it would serve no purpose to reiterate them here. *Harris* was overturned not because of its premise than an intangible price of property, such as a debt, travels with the debtor, or because it permitted an intangible piece of property to be attached and utilized as a means of securing jurisdiction. Those concepts remain valid and untouched by the decision in *Shaffer*. It is in those areas that the courts sustaining the *in rem* jurisdiction achieved

by a *Seider* attachment have looked to *Harris* for authority and in those areas *Harris* remains good law.

The part of *Harris* which was overruled had to do with its support of in rem jurisdiction based solely upon the presence of property within a state, which property was unrelated to the plaintiff's cause of action and which applied no standard of fairness or justice. This was precisely the same infirmity which caused the Supreme Court to invalidate the Delaware procedure utilized in *Shaffer* as this Court therein made clear.

> "The Delaware Courts based their assertion of jurisdiction in this case solely on the statutory presence of appellants property in Delaware. Yet that property is not the subject matter of this litigation nor is the underlying cause of action related to the property." 433 U.S. at 209.

The Court in *Shaffer* was careful to explain that this holding was not intended to affect *in rem* jurisdiction which did not suffer from those maladies and which otherwise satisfied the *International Shoe* standard of substantial justice and fairness.

This is not, however, to be interpreted as meaning that the location of property is unimportant in determining the propriety of an extension of state court in rem jurisdiction. This Court in *Shaffer* expressly realized that presence of property within a state may have a bearing on the existence of jurisdiction by providing important contacts between the forum and the litigants. It is only when the property forms the only contact with the forum state that under *Shaffer* it is insufficient to give that state jurisdiction. The *Seider* procedure does not rest solely upon the location of a res

within a state and thus does not become invalid because of *Shaffer* or the overruling of *Harris*.

III.

Distinguishing *Savchuk* from *Shaffer*

The decision in *Shaffer* does not invalidate the *Seider* attachment procedure which is the basis for in rem jurisdiction herein because the exercise of *in rem* jurisdiction by the State of Minnesota is factually distinguishable from that exercised by the State of Delaware overturned in *Shaffer*. Whenever a comparison of cases is made factual distinctions are apparent. However, in this instance these distinctions are substantial and go to the very heart of the constitutional question, for the problems this Court noted with jurisdiction based on the attachment in *Shaffer* are absent in *Savchuk*.

One fundamental difference is apparent at once when the interests of the two forum states is compared. In *Shaffer*, Delaware had little reason to be concerned with the outcome of the litigation for that state was neither the state of residence of either the plaintiff or the defendant, nor was it the situs of the tort which gave rise to plaintiff's cause of action. Delaware was selected because it was on paper the location of the property attached. In reality the res was even located outside of the state.

This should be contrasted with the actual contacts the State of Minnesota has in the instant case which give to it an active interest and concern lacking to Delaware in *Shaffer*. While Minnesota is not the site of the automobile accident underlying this lawsuit, it is the bona fide residence of the plaintiff and has been since the commencement of

the litigation. It is Minnesota which must protect and care for the plaintiff in the event of indigency, and it is its state services which the plaintiff uses. This fact of residence gives Minnesota a legitimate interest in providing a forum in which plaintiff may litigate their claims, as well as an active interest in the outcome of the case. This Court has even recognized the validity of a state's interest in protecting its own residents, albeit in another context. *Alaska Packers Ass'n. v. Industrial Accident Comm'n*, 294 U.S. 532 (1939). Thus Minnesota possesses an interest which far exceeds any interest asserted on behalf of the State of Delaware.

Furthermore, while as in *Shaffer* the named defendant is also a non-resident, there is here present another entity possessing significant contacts with the state, namely, the insurance company. Besides being the mere possessor of the res, the insurer is also the real party in interest in this kind of case. As has been recognized by other courts, it is the insurer who does the investigation, hires and pays for the attorneys, who makes all the strategy decisions and who ultimately provides the source of payment. The named defendant has little genuine interest beyond that of providing notification of the fact of the accident and in cooperating with the insurer. Here the insurance company, while not a Minnesota corporation, does conduct substantial business in that state through offices located within the state. The company is licensed by the state and is subject to continuing regulation by the state. These are, in fact, the very kinds of contacts which would render the insurance company itself amenable to *in personam* jurisdiction within the state. *International Shoe v. Washington*, supra. These contacts also give Minnesota additional reasons justifying the

extension of jurisdiction herein. There is nothing comparable in *Shaffer*.

Another major area of differences between the two cases is in the nature of the property seized. In Shaffer the res was stock certificates, items possessing an independent value and purpose for existence apart from the litigation. Also, as the Court properly recognized that property had nothing to do with corporate fiduciary capacity and thus was completely unrelated to the plaintiff's cause of action. However, in the instant case, the property garnished was a debt, an obligation between the defendant and his insurance company whereby the insurer assumes the responsibility to defend and if necessary indemnify. This obligation was created precisely for the purpose of protecting the defendant from a lawsuit such as was brought by plaintiff. As correctly recognized by the Minnesota Supreme Court in *Savchuk II*

> The insurer's obligation to defend and indemnify, while theoretically separable from the tort action, has *no* independent value or significance apart from accident litigation. In accident litigation, however, it is inevitably the focus, determining the rights and obligations of the insurer, the insured and practically speaking, the victim. (A-59)

In addition, it is this res which forms the entire source from which the plaintiff's claims are ultimately satisfied. Unlike *Shaffer*, the liability of defendant is confined to the value of the res and defendant need not fear personal liability in excess thereof.

The last major difference between the two cases is in the nature of the procedure itself. By statute the attachment procedure in *Shaffer* mandated a personal appearance by defendant. He thereby subjected himself to in personam jurisdiction and liability in excess of the value of the property attached for there was nothing in the Delaware procedure which operated to limit his liability. Thus, the attachment was in reality only an indirect method of achieving personal jurisdiction over a defendant, which this Court in *Shaffer* found impermissible.

The prejudgment garnishment procedure of Minnesota Statute 571.41, Subd. 2 is also a means of securing jurisdiction, but here there are present procedural safeguards unavailable to the defendant in *Shaffer*. Here, by decision of the Minnesota Supreme Court, liability is limited to the value of the res, or the policy limits (A-37 and A-60). Therefore, the defendant is not subjected to personal liability in excess thereof and the problem of *Shaffer* is avoided.

IV.

Establishing Minimum Contacts

The Supreme Court in *Shaffer* did not promulgate any new principles necessarily requiring a rejection of the limited jurisdictional procedure of *Seider* type attachments as was used in the present case. What the Court did in *Shaffer* was to require that ". . . all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progency." *Shaffer*, supra at 212.

This requirement in reality imposes no new duty of inquiry for, as was discussed above, the courts sustaining jurisdiction so acquired have already examined the pro-

cedure in those terms and not found it to be lacking. Courts following the decision in *Shaffer* have also reexamined the issue and arrived at the same conclusion. *O'Connor v. Lee Hy Paving Corp.*, 379 F.2d 194 (2d Cir. 1978), cert. den. — U.S. —, reh. den. — U.S. — (1979).

The Minnesota Supreme Court has twice examined this question and both times has concluded there is no due process violation by utilization of the *Seider* procedure. In its initial opinion, among the requirements the Court imposed upon was that the procedure be available only to plaintiffs who are residents of the state at the time the action is commenced. (A-37). The Court felt this was necessary to ensure that there were sufficient meaningful contacts with the state to justify the exercise of jurisdiction. (A. 35 note 6.) On remand the Minnesota Supreme Court again examined the relationship between the forum, the parties, the property and the litigation. They felt that Minnesota did possess the requisite kind of contacts.

Nothing in *Shaffer* commands a different result. The standard of *International Shoe* rests upon the relationship between the parties, the forum and the litigation. As indicated by the foregoing discussion, the plaintiff herein is a state resident who has invoked the strong public policy of this state of providing protection for its residents. It is clear that the real party in interest, i.e. the "defendant" to whom the jurisdictional and constitutional analysis should apply, is the insurer, who is also present, doing business within the state. Furthermore, not only is the property which was the subject of the attachment at the heart of plaintiff's cause of action, but the very purpose for its existence is to provide a defense and source of recovery in this kind of action.

Acceptance of the *Seider* type procedure does not necessarily mean that it must be utilized in every conceivable situation. Potential abuses, such as those cited in Appellant's Brief (pages 16 and 17) could be prevented by legislative or judicial limitation. There is also available change of venue procedures and the doctrine of *forum non-conveniens* if a court is persuaded that prejudice to a particular defendant or his increased burdens outweigh the plaintiff's interest in a home forum.

It again must be emphasized that the Supreme Court has never required the "best" contacts, but only "minimum" contacts. In view of those considerations, it cannot be said that there do not exist sufficient contacts with the state that an extension of state court jurisdiction would offend "traditional notions of fair play and substantial justice." The *Seider* attachment procedure thus does comply with the standard of fairness enunciated in *Shaffer* and should be upheld.

CONCLUSION

On the basis of the arguments advanced and the authorities cited herein, it is respectfully submitted that the decision of the Minnesota Supreme Court should be affirmed.

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vs.

JEFFREY D. SAVCHUK,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page

Argument:

I. Lack of Significance of Plaintiff's Residence ... 1

II. Lack of Significance of the Insurer's "Presence" 3

III. Lack of Significance of the Limitation on Defendant's Liability 6

IV. Significance of Defendant's Lack of Contacts .. 6

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Gjorik v. Bemidji Local Bus Line, 223 Minn. 552, 27 N. W. 2d 273 (1947) 5

International Shoe Co. v. Washington, 326 U. S. 310, 319 (1945) 2, 5

Miller v. Market Men's Mutual Ins. Co., 262 Minn. 509, 115 N. W. 2d 266, 268 (1962) 5

Myers v. Government Employees Insurance Co., 302 Minn. 359, 225 N. W. 2d 238, 243 (1974) 5

Perkins v. Benguet Consolidated Mining Co., 342 U. S. 437, 446-47 (1952) 4

Savchuk v. Rush, 245 N. W. 2d 624, 629 (Minn. 1976) 5

Shaffer v. Heitner, 433 U.S. 189 (1977) 1, 2, 4, 6

Simpson v. Loehmann, 21 N. Y. 2d 990, 324 N. E. 2d 669, 678 (1968) 5

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-952

RANDAL RUSH, et al.,

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ARGUMENT

I.

Lack of Significance of Plaintiff's Residence

In the final analysis, *Shaffer v. Heitner,* 433 U. S. 189 (1977), does mean and will mean exactly what this Court says it means. However, it is instructive to compare this Court's clear language with the meaning derived therefrom by the appellee in the instant case. In *Shaffer,* this Court held:

> "The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent

with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe.*" (433 U. S. at 207).

And what is the minimum contacts standard elucidated in *International Shoe?* It is the "relationship among the defendant, the forum and the litigation" (433 U. S. at 204).

The first step in appellee's reasoning is to paraphrase this standard as follows: The "relationship between [sic] the forum, the par*ties*, the *property* and the litigation".[1] This paraphrase substitutes "parties" for the defendant and adds "property" to the standard.

If the instant case were an in rem action in which title to the seized property was at issue, or if the instant case involved an accident which occurred on the seized property, then the addition of "property" to the standard would be legitimate (See *Shaffer*, 433 U. S. at 207-208). But where the seized property, as in the instant case, is completely unrelated to plaintiff's cause of action and the only role played by the seized property is to bring the defendant into court, appellee's addition of "property" to the standard is entirely inappropriate (See *Shaffer*, 433 U. S. at 209).

Much more troublesome is the substitution of "parties" for "defendant" in the standard. One need only read a few pages further into Appellee's Brief[2] before it becomes obvious that when appellee uses the term "parties", he means "plaintiff". According to appellee, it is plaintiff's residence in Minnesota which, however transitory, provides the principal—indeed the controlling—constitutional nexus.[3]

[1]Appellee's Brief, p. 7 (emphasis supplied).
[2]Appellee's Brief, pp. 10-11, 14.
[3]It appears that appellee has once again emigrated—this time to Pennsylvania. While not directly material to the issues of this case, appellee's history of being a resident of three states in six years is significant. Our migratory tendencies demonstrate how ephemeral is the residency of a plaintiff in any balancing of interests of the parties for due process purposes, and illustrate how fragile are the pious pronouncements of the Minnesota Courts concerning the necessity of providing a local forum for its Minnesota residents. (See *Savchuk I*, A. 37; 245 N. W. 2d 624; *Savchuk II*, A. 58-59; 272 N. W. 2d 888).

Of course, it would be quite simple if the controlling minimum contact were plaintiff's residence in the forum state. One would only need to ascertain plaintiff's residence to establish jurisdiction. But plaintiff's residence is utterly immaterial to the establishment of due process as to the foreign defendant. It is he, not the plaintiff, who is being dragged to a distant forum and exposed to substantive law rules which are far different from those in effect in his home state—the locus of the alleged delicti—the *only* state with a relationship to the litigation. No due process question exists as to plaintiff; the sole issue is whether or not due process is being afforded to the defendant by the quasi in rem procedure utilized by plaintiff.

II.

Lack of Significance of the Insurer's "Presence"

Appellee attempts to bolster his argument that the plaintiff's residence should be the controlling factor by pointing out that the defendant's insurer, because it does business in the forum state, is fortuitously "present" there and thus is fortuitously subject to in personam (garnishment) jurisdiction there. Stripped of its sophistries, plaintiff's argument must be recast as follows: If defendant's insurer is fictionally present in the forum state, then defendant is afforded due process; if it is not, then defendant is not afforded due process. When viewed in this manner, it is readily apparent that the presence of the insurer within the forum is not constitutionally significant. The insurer's presence in Minnesota is

wholly unrelated to the Indiana defendant and to the Indiana contract of insurance and to the Indiana accident. Defendant cannot control where his insurer may or may not do business. The fact that the insurer may write policies in Minnesota insuring Minnesotans has nothing to do with the defendant's or his insurer's activities in Indiana.

Appellee's argument may easily be tested by changing one fact in *Shaffer*. Suppose that plaintiff Heitner had not attached corporate stock and had, instead, attached an officer's and director's professional liability policy issued to the defendants in Oregon by a foreign insurance company which was "present" in Delaware because it did some business there. Would not this Court have decided the case in the same manner and for the same reasons? What difference does the kind of res make so long as the res is not the subject matter of the litigation?

Furthermore, as this Court held in *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437, 446-47 (1952), the *International Shoe* test of fairness governs an attempted assertion of in personam jurisdiction over a foreign corporation in respect to a claim against that corporation arising out of business conducted outside the forum state. It follows that even greater scrutiny should be given to an attempted seizure of an obligation which is owed by a foreign corporation to a nonresident of the forum state and which is wholly unrelated to the business conducted by the foreign corporation in the forum state. In the usual *Perkins* case, the plaintiff has a direct claim against the foreign corporation—not against somebody else. But where the fictional "presence" of the foreign corporation in the forum (a) is used by a plaintiff (b) to seize a contingent obligation owed by the foreign corporation to a defendant who is a

nonresident of the forum state (c) which obligation arises out of business not conducted in the forum state (d) for the sole purpose of obtaining quasi in rem jurisdiction over that nonresident defendant, it would seem that the *International Shoe* element of fairness in respect to the exercise of such in personam jurisdiction over the foreign corporation is entirely lacking. In this regard, this Court's cautionary language in *International Shoe Co. v. Washington*, 326 U. S. 310, 319 (1945), is pertinent:

> "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

Certainly it cannot be said that the insurer in the instant case derived any protection or benefits of Minnesota law when it made a contract in Indiana with an Indianan, thus justifying a *Harris v. Balk* attachment in Minnesota of its obligation to that Indianan. As suggested by the dissent in *Simpson v. Loehmann*, 21 N. Y. 2d 990, 324 N. E. 2d 669, 678 (1968), this kind of attachment can be justified only where requisite *International Shoe* minimum contacts with the seized property exist.[4] However, regardless of the

[4] In this context, it should be noted that under Minnesota law, a liability insurer is not deemed a real party in interest in a tort case and is not subject to direct suit regardless where the tort claim arose. E. g., *Myers v. Government Employees Insurance Co.*, 302 Minn. 359, 225 N. W. 2d 238, 243 (1974); *Miller v. Market Men's Mutual Ins. Co.*, 262 Minn. 509, 115 N. W. 2d 266, 268 (1962); *Savchuk v. Rush* (I), 245 N. W. 2d 624, 629 (Minn. 1976) (A. 38); see also *Gjorik v. Bemidji Local Bus Line*, 223 Minn. 552, 27 N. W. 2d 273 (1947).

constitutional validity of the ganishment, this Court need not consider that matter (unless it so wishes) because of the lack of the requisite minimum contacts with the defendant himself.

III.

Lack of Significance of the Limitation on Defendant's Liability

Appellee also seeks to distinguish *Shaffer v. Heitner, supra,* on the basis that, in *Shaffer,* an appearance by the defendants would have subjected them to an exposure in excess of the value of the seized property while, in the instant case, defendant's exposure is limited to the value of the seized property.[5] This argument overlooks this Court's clear pronouncement that the fairness of subjecting a defendant to state court quasi in rem jurisdiction does not depend on whether or not his liability is limited to the seized res (See *Shaffer,* 344 U. S. at 207, n. 23).

IV.

Significance of Defendant's Lack of Contacts

In summary, appellee's argument concerning the relationship among the forum, the parties, the property, and the litigation is merely a poorly disguised attempt to disregard the *Shaffer* standard of the relationship among the defendant, the forum, and the litigation, and to substitute therefor an entirely novel standard—the relationship among the plaintiff, the forum, and the insurer. But, no matter how appellee's argument may be viewed, it cannot survive the corollary standard so clearly stated in *Shaffer:*

[5]Appellee's Brief, pp. 12-13.

> "* * * if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible * * *." (433 U. S. at 209).

Since defendant has absolutely no contacts with the State of Minnesota, it follows that, as the Chief Justice of Minnesota candidly noted in *Savchuk I,* there is no basis for an assertion of personal jurisdiction over him.[6] Therefore, there is no basis for an assertion of quasi in rem jurisdiction over him.

CONCLUSION

Appellants respectfully request that the judgment of the Minnesota Supreme Court be vacated and that the action against them be dismissed for lack of jurisdiction.

Respectfully submitted,

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[6]A. 16; 245 N. W. 2d 629.

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Appellants,

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Respondent.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA.

Motion by the New York State Trial Lawyers Association to File Brief *Amicus Curiae* on Behalf of Respondent [redacted]

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Table of Cases.

	Page
Donawitz v. Danek, 42 N.Y.2d 138, 397 N.Y.S.2d 592, 366 N.E.2d 253 (1977)	2
Farrell v. Piedmont Aviation, 411 F.2d 812 (2d Cir.), cert. denied 396 U.S. 840 (1969)	2
Fish v. Bamby Bakers, Inc., 76 F.R.D. 511 (N.D.N.Y. 1977)	2
O'Connor v. Lee-Hy Paving Corp. (579 F.2d 194, 195)	2
Seider v. Roth (17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 [1966])	1, 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

RANDAL RUSH, *et al.*,

Appellants,

against

JEFFREY D. SAVCHUK,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA.

Motion by the New York State Trial Lawyers Association to File Brief *Amicus Curiae* on Behalf of Respondent and to Participate in Oral Argument.

The New York State Trial Lawyers Association (NYSTLA) hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of respondents, and leave to participate in oral argument, as provided for in Rules 42 and 44 of this Court. The consent of the attorneys for the parties has not been obtained.

NYSTLA is primarily an organization of trial attorneys practicing in the state and federal courts in New York, having a total membership of approximately 2,500. Its members frequently litigate cases in which jurisdiction has been obtained in accordance with the procedures outlined by the New York Court of Appeals in *Seider* v. *Roth* (17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312

[1966]), i. e., by the attachment of the obligation of insurers licensed to do business in New York to defend nonresident defendants and to pay damages recovered against them. Consequently, the basic issue posed in this case, which concerns the constitutionality of those procedures, is of the deepest concern to NYSTLA and has implications extending far beyond the particular situation now pending before the Court.[1] NYSTLA, as the principal spokesman for the trial lawyers of New York State, was granted permission to present its views on this subject to the United States Court of Appeals for the Second Circuit in *O'Connor* v. *Lee-Hy Paving Corp.* (579 F.2d 194, 195), a case in which this Court denied certiorari on December 9, 1978 (99 S.Ct. 639) and rehearing on April 16, 1979.

Respondent's brief necessarily concentrates on the peculiar facts of the Minnesota statute. In the brief we propose to tender, the problem will be treated in more generic fashion. Specifically, we intend to emphasize certain significant factors in the history of the doctrine of *Seider* v. *Roth (supra),* the seminal case in New York, particularly the long-term reliance attorneys have placed on its validity and the widespread effect of a "retroactive" holding on pending litigation; the "collateral estoppel" effect of a judgment obtained in this manner—a matter that has troubled two Justices of this Court (see

[1]In *O'Connor* v. *Lee-Hy Paving Corp.* (579 F.2d 194, 199 n. 6 [2d Cir. 1978], cert. denied U.S. , 99 S.Ct. 639, reh. den. U.S.), Judge Friendly noted that the particular factual context of *Savchuk* v. *Rush* might not support a retention of jurisdiction because the plaintiff was not a resident of the State at the time of the accident. In New York, such residence is mandated (see *Donawitz* v. *Danek,* 42 N.Y.2d 138, 397 N.Y.S.2d 592, 366 N.E.2d 253 [1977]; *Farrell* v. *Piedmont Aviation,* 411 F.2d 812 [2d Cir.], cert. denied 396 U.S. 840 [1969]; *Fish* v. *Bamby Bakers, Inc.,* 76 F.R.D. 511 [N.D.N.Y. 1977]).

opinion dissenting from denial of certiorari at 99 S. Ct. 639)—, and pertinent policy considerations, such as the right of a state to impose the obligation to submit to jurisdiction to suits on insurance companies as a condition for doing business in the state, and the use of *forum non conveniens* to alleviate any inconvenience to various witnesses and parties, which we believe the Court should take into account. We feel that our contribution along these lines may assist the Court in viewing the problems here presented in broad context, thus ensuring a fuller presentation of the grave import its decision may have for attorneys throughout the country.

We, therefore, request that the Court permit us to file a brief *amicus curiae* within a time period to be fixed by the Court and to participate in oral argument.

Respectfully submitted,

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